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CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE

HEARING

BEFORE THE

SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-FOURTH CONGRESS

SECOND SESSION

MAY 19, 1976

Printed for the use of the Committee on the Judiciary

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CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE

WEDNESDAY, MAY 19, 1976

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 357, Russell Senate Office Building, Senator John V. Tunney (chairman of the subcommittee), presiding.

Present: Senator Tunney.

Also present: Jane L. Frank, chief counsel; Douglass Lea, counsel.

OPENING STATEMENT OF HON. JOHN V. TUNNEY, A U.S. SENATOR FROM THE STATE OF CALIFORNIA; CHAIRMAN, SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

Senator TUNNEY. Today's hearing borrows its theme from a speech delivered 70 years ago by a young Nebraska lawyer named Roscoe Pound.

Pound startled the organized bar of his day by assessing the causes of popular dissatisfaction with the administration of justice.

His was a broad-ranging analysis—some of it focused on general considerations about the role of law, some on the idiosyncracies of the Anglo-American system, some on judicial organization and procedure, and some on judicial administration.

Many of his observations still hold true—for example, his comment on the strains caused by using the law to resolve great moral questions and his observation that, in Anglo-American jurisprudence, there is a conflict between the individualized treatment of specific cases in the common law and the collective orientation of other means of making public policy.

And yet our era differs considerably from the first decade of this century. When Pound spoke in 1906, blacks could not belong to the organized bar; women could not vote; workers and many other interests were scarcely enfranchised.

Thus, today's hearing is designed to reconsider Mr. Pound's remarks and reassess the situation for 1976.

Some of this work was begun earlier this year at a conference in St. Paul, Minnesota, jointly sponsored by the Judicial Conference of the United States, the Conference of Chief Justices, and the American Bar Association.

In St. Paul, the Chief Justice, Attorney General and several hundred judges and lawyers discussed ways to ease the caseload in the courts, especially the Federal courts.

They failed to discuss the broader issues about access to the justice system—issues central to Dean Pound's remarks of 70 years ago.

And, with the exception of a handful of invited guests, they failed to include the people—the users or would-be users of the justice system.

Indeed, the St. Paul conference would have been better titled "The Judicial Causes of Dissatisfaction with the Populus."

Today's hearing is specifically designed to ask the broader questions. We are exploring why so many Americans—consumers, taxpayers, minorities, women, civil libertarians—are dissatisfied with the justice system, and what the Congress ought to do about it.

My indepth study of these issues began 3 years ago when my Subcommittee on Representation of Citizen Interests (now merged with this subcommittee) held extensive hearings on the adequacy of legal representation.

Because of that inquiry, I have some views which, I predict, many of today's witnesses share.

First, what are the causes of dissatisfaction?

To begin with, Federal and State courts are overcrowded and the costs of litigation are astronomical. Interminable delays result from seemingly meaningless procedures. Once in the courtroom, litigants are treated on an assembly-line basis, by arrogant and insensitive court personnel.

Beyond the courts, most of the other parts of the justice system are also unresponsive: Lawyers, a necessary ingredient to any court case, are generally inaccessible and too expensive for average citizens; laws and regulations are too complicated to understand and often unenforced; and Government departments and agencies are mired in red tape.

Moreover, recent Supreme Court decisions have made the Federal courts less accessible to the ordinary citizen and have substantially curtailed their ability to vindicate basic constitutional rights.

In *Eisen* v. *Carlisle*, the Court severely restricted the ability of small claimants to secure effective relief through class action suits. By requiring these claimants to incur the massive costs involved in notifying each and every individual who might have a similar legal claim, the effectiveness of the class action as a vehicle for securing judicial attention to the rights of the consumer has been severely eroded.

In *Warth* v. *Seldin*, the Court set a "standing" requirement so stringent that it left victims of discriminatory zoning ordinances virtually without recourse in Federal Court. The Court dismissed the complaint of inner city minority residents, arguing that the damage suffered by their exclusion from suburban communities was too remote to warrant the Court's consideration.

And in *Doe* v. *Virginia*, the Court "summarily affirmed" a 200-year-old State statute forbidding private homosexual acts. Without ever hearing arguments, the Court, in effect, has made a dramatic and powerful decision that dangerously encroaches upon the cherished right of privacy.

In other cases, where the Court has consented to review the merits of an individual's constitutional claim, substantive rulings have set a precedent which threatens to restrict severely the individual's access to judicial review.

In *Paul* v. *Davis*, for example, the Court took a very narrow view of the due process clause's reach over State activities, holding that it was exclusively limited to cases where individuals could show that State activity directly restricted their liberty or property rights. Under this standard, the complainant, who will testify today, was given no redress from a police practice of publicly-circulating lists of accused shoplifters who had never been convicted in a court of law.

Finally, in *United States* v. *Miller*, the Court shrunk the legally protected scope of an individual's expectation of privacy in regard to his own personal papers. Now, once people have transmitted their bank statement to a financial institution, they have forfeited their fourth amendment protection. They take the full brunt of the risk that the third party may transfer this information to the Government.

The Court's opinion is all the more startling since the California Supreme Court, in an eloquent opinion by Justice Mosk, had unanimously concluded that individuals should have access to the courts to challenge a subpena of their bank records and their admissibility at trial.

These recent decisions have contributed to widespread cynicism and alienation from the justice system.

I recall that one witness at my earlier hearings on lawyers said, "the system works against me, not for me." No doubt, we'll hear more of that today.

What are some remedies, and, particularly, what should the Congress do?

Above all, we must retool, and, where necessary, redesign the justice system so it cares about people.

With respect to court congestion, we need more and better-trained court personnel.

We also must expand alternative dispute resolution mechanisms. Some needed changes involved the adversary process and lawyers. Others include experiments with "no-fault" settlements and with informal proceedings without lawyers.

In this respect, I fundamentally disagree with the views of Solicitor General Bork at the recent St. Paul Conference. He said that litigation resulting from social welfare legislation was "legal trivia" and ought to be removed from the Federal courts.

In my view, no cause involving fundamental human rights should be removed from the courts unless and until alternative processes are fully operating and in place.

We also need to make legal services more available. Low-cost mechanisms to deliver legal services must be encouraged, including legal clinics, prepaid legal plans, and paralegals.

More information must be made available about what lawyers do, where they are, and what they cost. I am delighted that the California State bar and several others have commenced some experiments with advertising to let people know more about lawyers.

More must be done to simplify the legal system: to adopt model probate codes, and other kinds of standardized forms and remedies. I favor no-fault auto accident insurance.

The Congress must prod the legal profession to serve more people, and increase funding and other incentives for civil and criminal legal services for the poor and middle-income groups.

It must also play an active role with respect to some of the recent Supreme Court rulings: To facilitate the bringing of consumer class actions; to relax standing requirements; to authorize courts to award attorneys' fees to prevailing parties in public interest litigation; to require the updating of inaccurate arrest information, and to protect the privacy of personal bank records.

I have authored or supported legislation on most of these subjects, and am fighting to enact these bills into law.

In sum, today's hearing is very important. It should serve to focus more public attention on the enormity and gravity of the issues.

In our justice system, people must come first.

The subcommittee spent a good deal of time assemblying our witnesses for today, and I am very pleased that everyone could come. No group is better qualified to address these issues.

Our first witness is the respondent in a recent Supreme Court decision that, in my opinion, has a devastating impact on our constitutional protections.

The second witness is president of the major Federal program to provide legal services to the poor in civil matters.

Our third is a State senator, long active in civil rights issues, who will be accompanied by two lawyers who, to my knowledge, are the best known litigators in the Nation for the rights of minorities.

Our fourth witness runs the Nation's largest consumer organization and herself has litigated many of these issues.

The next witnesses run two different taxpayer organizations, both involved in court action on behalf of taxpayers.

Our final witness, a frequent guest at subcommittee hearings, is the executive director of the ACLU, which has brought most of the landmark constitutional challenges in this century.

I have read the prepared statements, and I am impressed with their high quality. The agenda for the Congress is a long one, and we are taking a major step today.

I would like to point out that in as much as we have six witnesses, we are going to have to stay within rigid time limitations; otherwise we will not be able to get through the agenda. We are going to have to have about 25 minutes per witness. There are questions that I would like to ask the witnesses, and if the witness cares to be asked questions then I would ask for an abbreviated reading of the prepared statement, which will be incorporated in the record as if read. If the witness decides that he wants to read the entire statement then there will be less time for questioning. I am going to stick rigidly to the 25-minute rule for all witnesses.

Our first witness is Edward Charles Davis, who is respondent in *Paul* v. *Davis*, and who is accompanied by Daniel T. Taylor.

Thank you for being with us. Please proceed.

TESTIMONY OF EDWARD CHARLES DAVIS, RESPONDENT IN PAUL v. DAVIS

Mr. DAVIS. How the police departments and police chiefs publishing and circulation of an active shoplifter's notice branding me as a convicted criminal, and also an active shoplifter, has affected my personal life.

On June 14, 1971 while leaving a Louisville retail store, I was detained by a security guard and accused of stealing something from the store or "looking like I should have." Following a police court hearing, the case was dismissed.

Shortly thereafter my name and picture appeared in a police department notice listing me as a "known active shoplifter." This action on the part of the police has caused me irreplaceable damage to my good reputation, which I have worked hard for over the years. The reason I say I have worked hard for my good reputation is because of my social and economic position in this country. My reputation is something that does not come automatically. In my experience, the negative of me is assumed by the general American public, especially white America. The listing of my name and photo in a publication circulated among businesses in Louisville has been punishment for a crime I never committed.

This action on the part of local police has resulted in untold humiliation and embarrassment to me by, my family, associates, and professional colleagues, especially at the then place of employment, the Courier-Journal and Louisville Times photographic department.

Shortly following the publication, my department head, executive director of photography, called me into his office and informed me that two of the members of the staff had saw the active shoplifter's notice and that I was listed on the notice by the Louisville Police Department, and that if I was arrested for any reason whatsoever I would be fired.

At that time my department head also informed me that the shoplifting notice would impair my ability to perform my photographic duties; he felt that the company could not feel free to send me on any assignments that would require me to come in contact with local retail stores.

Unfortunately, it did not take long for everyone in the department to know that I was on an active shoplifters' list, and at that time I was the only black working in the department, which made it extremely difficult for me to function. I suffered untold humiliation and ridicule from members of my department. After 6 or 7 months the pressures on the job and strain on my nerves got to the point where I felt the only way out was for me to resign in order to regain back my full sanity and what little self-respect I had left. I used the excuse of continuing my education as the reason for my resignation. It was difficult enough being the only black photographer at the Courier-Journal and Louisville Times, but virtually impossible for me to function with the abuse from the general public and the unique situations I was placed in as a news photographer.

Even after everyone learned that I was unjustly placed on the shoplifting notice, the jokes and questions still persisted and I kept

finding myself in extremely embarrassing positions due to my job, and the people I come in contact with. For an example, one embarrassing incident was when an acquaintance of mine called the owner of the newspaper and accused me of detaining him so that someone could break into his house and steal his personal possessions, a ridiculous accusation, made believable only by the shoplifters' publication. The only reason why I had any dealings with this person who made this accusation against me is because he asked if I would make a picture for him to go on his campaign poster as a favor for him. After communicating with this person after he had made these accusations to the owner of the company, he gave me reason to believe that he was motivated to accuse me because of a direct result of the shoplifters' notice. Since then I was cleared of the accusation by police detectives, which in their opinion found the whole incident bizarre. I was informed of the phone call made by this man by my department head, who also informed me that I must be cleared by the police of this accusation made against me. Here, too, exemplifies the extent of the assumption of guilt by the department head.

I found myself not doing simple things, like not going downtown, not wanting to go shopping with friends. The publicity surrounding my case and my decision to seek help through the justice system also created unwarranted humiliation to myself and my immediate family. After finally leaving my place of employment I found it difficult to find jobs in my expertise, because the newspaper that I was employed with was the only daily in town, and perspective employers in other lines of work were reluctant to hire me because of the publicity and implications of the police department's publication.

The publicity surrounding my case and my decision to seek help through the judicial system also created unwarranted humiliation to myself and my immediate family.

Now 5 years later after trying to clear my name through this country's judicial system I am broke, without employment, emotionally sick and in a state of anxiety. In my experience, the inability of the court system, the people who operate it, the political and economic environment as it presently exists has made a mockery of justice.

Being black in this society has all too often been considered a crime in itself, especially when attempting to get a piece of the American pie. In seeking some sort of legal compensation "the right way" through the courts, I find myself, a young black person, totally disillusioned with American society, its judicial system and its political and economic system, a system that tells the rest of the world its way is best.

I have neither the financial nor the emotional drive to continue fighting with this system any longer. And I ask, should I have to?

If I was a well-known white middle-class salesman of high standing in the community in which I worked do you think this police publication would affect my earning ability?

To this day I have no criminal record. I am wondering what the final judgment on my case would have been if my last name was Firestone.

I say to you, this police action is claiming to the Louisville community that I am an active criminal and a convicted one.

Have I done anything to merit punishment by the State without due process?

Can you make the presumption of innocence after viewing the active shoplifters' notice?

If a person's good reputation is of worth, why is mine taken away without due process of law, especially when it has been done by State officials?

Why should I be punished by the State without due process of law?

I say to you, it was not mere defamation but an official branding as a criminal without due process of law by the State. The State has condemned me, an innocent law-abiding citizen, as a criminal. Arrest is guilt of a crime in most minds.

The Supreme Court tells me to go back to the State where I got screwed the first time and more than likely will get screwed again. I find myself caught in the middle of a corrupt and inadequate judicial system on one side and with police officers with broad discretionary powers on the other; damned if I do, damned if I don't.

Must I leave it up to the criminal to right his wrong?

The Supreme Court ruling on my case has confirmed what the brother on the corner has always been telling me in a roundabout way about this system, that for the black man that gets caught up in the system, having no political and economic power or stake in the system, had better step lightly because the system can and will crush him at will.

Richard Nixon appointed four Supreme Court Justices, and they all voted against me. One day I would like to appoint four Supreme Court Justices, all from different geographic locations, all seeing things the way I do.

Here I sit, born with a social stigma, being black, and the stigma attached to it and its negative stereotypes, and I work to reverse it. What gains I have made the State has taken away intentionally, without regard for due process of law; no accident. I am suffering from the act of official tyranny.

Have I the right of privacy, the right to due process of law, the right to the assumption of innocence?

If a publication of this active criminals list was to aid only merchants, businessmen and their security police, how did two of the Courier-Journal and Louisville Times staff photographers get hold of it?

How could my department head go to a store and see it?

How was I able to go to the police department at three different times with three different excuses for having a need for this publication and receive it? None of us are merchants or security officers.

I have suffered grievous mental anguish, summary punishment, I, an innocent person. The past cannot be relieved or revised, reversed or relived. I have suffered injustices in the lowest courts in the land; now I must suffer the ultimate alienation in the Bicentennial year of this country by way of the Supreme Court, but then again, I have always been made to feel like an alien in my own country, even in early childhood.

Injustice and alienation is nothing new for me, other members of my family, and friends. When I was young my father, Edward Y. Davis, Jr., was forced to sell four lots to the State for $300. The $300 did not equal the amount he paid in taxes for the lots.

Some years later he was forced to sell his property to Urban Renewal in which the nonblack owners with property of similar size and value were paid twice the amount he received. About 10 years later my father had property auctioned off by the State; $17,000 was invested in the building, the building was sold for $1,999 just to pay off a $2,000 lumber bill that was past due.

Another one of my later experiences was when driving a newly purchased used car I was stopped, arrested, handcuffed, waited an hour and a half for a tow truck to tow my car in, then rushed off to jail with excessive speed, all because of a recently expired license plate.

I asked a friend of mine, who is a police court judge, if the officers actions were routine. He told me, "It is routine for that to happen in your part of town if you are black, but normally officers give traffic citations for the offense. It is left to the discretion of the police officers to issue a citation or arrest you. It probably would not have happened if you were on the other side of town and were white middle-class." One of my many experiences.

Another one of my alltime greats was the time when I was garnisheed for $90 without due process of law. I was garnisheed and the $90 was deducted out of my check. I went to court and asked the judge why this happened. He said I was summoned to appear in court and did not. I protested to the judge. He then showed me where I signed a proof of service. It was proven in fact to be a forged signature signed "Eddie Davis." I told the judge I never signed any business signatures "Eddie Davis," only "Edward C. Davis III." This gave me a suspicion to believe that someone who knew of me forged the signature thinking I go by what my friends know me as. The bailiff testified under oath that I was not the person served. The summons named me as Edward C. Davis III and not Eddie Davis. The judge refused to return my money, but I finally got my day in court. To make a long story short, a car dealer got my $90 claiming I owed a $90 bill for work he thought was done on my car, and the proof of that thought to be done work was the testimony of an auto estimator who admitted he did not see any work done on the car or did any himself. He was only told it was and had a bill unsigned with a description of my car and my name.

One of the greatest legal tragedies I have witnessed was the sentencing of 4½ years given my attorney, Daniel T. Taylor III, who sits beside me, without due process of law for contempt. The only crime I could see him guilty of was defending his client and trying to make the system work for the socially and economically disadvantaged, confronting judges that are tyrants carried in the hip pockets of businessmen does take a toll.

In conclusion, the only thing Congess can do for me personally is to give me economic justice. I do not mean food stamps or extended unemployment benefits; I need a stake of the system, a piece of the rock; for example, a bank, factory, company, the means to produce a self-sufficient place in this society. Then I could move in the neighborhood of the judge. Maybe he would get to know me. He may even see that I am a human, a citizen, and not an alien in this country. He might even change his attitude and have true feelings for justice.

Why can't blacks melt in the melting pot?

On May 19, 1976, I am still an alien in my own country, the country of my father. He was alienated, too.

Thank you.

Senator TUNNEY. Thank you, Mr. Davis.

The story that you tell is a very compelling one. The outrage of having your picture and name published and then disseminated throughout the community is one that can only be truly comprehended when we listen to you testify as to how it has affected your life.

The Supreme Court, in overturning the circuit court's decision in your case used, what I am sure to you, is a meaningless technicality: that you should have sought relief in the State courts. Recognizing this, I would still like to be able to ask you why you have not sought such relief in the State courts. Is it just that you are emotionally, spiritually worn out? Or is it the present financial burden of seeking such relief? What are the reasons that made you decide not to go to the State courts?

Mr. DAVIS. I think my attorney should answer that question.

Senator TUNNEY. Okay.

Mr. TAYLOR. We have in our State what is called a statute of limitations, which, of course is universal in any jurisdiction, so Mr. Davis and myself and his other council had to opt at the time, to borrow and appreciate your word, at the time of the outrage we had to opt which forum to move in. We are foreclosed from further relief. To use a phrase, we are sitting there with egg on our face, as it were. There is no way we can get back in State court. It is somewhat similar to the case of a couple of weeks ago, again, an action in Federal court of deprivation of constitutional rights where the Burger Court said that you move too late or—once again we have the old form instead of substance thing, but to make it short, we are foreclosed at this time. We put our reliance in the Federal system, Senator.

Senator TUNNEY. I assume that the Supreme Court knew that you were foreclosed?

Mr. TAYLOR. Senator, I do not know what their familarity is with the law after that decision.

Senator TUNNEY. Did you indicate in your brief that you were foreclosed from going into the State court?

Mr. TAYLOR. In honesty with you, we did not think that the case should or would conceivably turn out—we did try to anticipate what technicality they might proceed to, I think, avoid their responsibility in the matter, and we could talk more in terms of showing a compelling interest in immunity of judicial leaders and the office and that type of thing.

Senator TUNNEY. What about the future; will the arrest record ever be expunged?

Mr. TAYLOR. Senator, the case, if you please, the hearing, you might say, the ongoing program in conjunction with the ACLU and the other organization would have been to move in this area from success in Mr. Davis' case, which we were very hopeful for, and then into any expungement action which the prior court—and, of course, I make the contrast between the Warren Court and the Burger Court, which the prior court had given some sort of signal could be coming.

Senator TUNNEY. Has this shoplifters' notice been updated?

Has it been circulated in other jurisdictions?

Mr. DAVIS. Not to my knowledge.

Senator TUNNEY. Most employment application forms ask whether the applicant has ever been arrested.

Do you believe if you answered truthfully that your chances for employment would be prejudiced in the future?

Mr. DAVIS. Yes. Definitely.

Senator TUNNEY. Have you made any plans regarding your future?

Mr. DAVIS. I am still seeking employment. I will probably finish up college and I might possibly even move out of town.

Senator TUNNEY. You mentioned the harassment and pressure that was brought to bear on you by your coworkers, about the fact that you had this record.

Did you at any time see the police chief and ask him to remove your name from the list?

Mr. DAVIS. It wouldn't have done any good. I mean, the flier had already been circulated; the damage was done.

Oh, we did seek an injunction, and we did not get it.

Senator TUNNEY. And you did not get it?

Mr. DAVIS. Did not get it.

Senator TUNNEY. Was that in the State court?

Mr. TAYLOR. It was in the Federal Court. It was the Christmas season and we sought to block the dissemination, and failed totally in the district court, which, of course, threw us out. It was the Sixth Circuit that sent us back to an evidentiary hearing, and from there to the Supreme Court.

Senator TUNNEY. I see. To read from the chief of police's flier, which will be incorporated as a part of the record: "These persons have been arrested during 1971–72 or have been active in various criminal fields in high density shopping areas." Of course, that is the flier in which your name appears.

I can only say that I think that the court is dead wrong in the decision that they made. To disseminate a person's picture bearing his name throughout the business community and to say that this person has been arrested—despite the fact that the outcome of the arrest was a dismissal of charges—is just unconscionable, and I am very displeased with the decision. I wish that it had been the other way.

Does your lawyer have any suggestions as to what the Congress might do?

Mr. TAYLOR. If you please, Senator, Eddie and I came over here at your invitation, and there is just something that I just very quickly want to say to the Senator, and it is this: I take direct issue with Chief Justice Burger's remark as expressed in the Renquist opinion about this plethora of litigation in the Federal system. Had Senator Alvarez been here today, I had occasion last year to be in South Dakota defending Sioux Indians. Now, I did not notice at that time any paucity of Federal resource when it came to prosecuting minority people. I did not notice any failure of court rooms or judges or prosecutors over from Washington talking about the system, how it works. The system, it seemed to me, works against the people, and particularly I subscribe to what Justice Douglas said over and over again repeatedly, that the problem was not overloading the court; it was orientation that the Court wants to preserve, and I refer to the Supreme Court, preserve it province.

But I submit, just merely as a workaday civil rights radical lawyer, that if there are not enough courts to handle the preservation of the

rights of the people then the remedy is to make more courts, or whatever, and not to deny the people their rights. I just did want to say that to you, sir.

Thank you.

Senator TUNNEY. I concur with your belief that this decision is offensive, whatever the reasons. I can understand its justification—the technicalities that were applied by the Court—but I still find the result offensive. I want to thank you both for coming here.

Good luck to you.

Mr. DAVIS. Thank you.

[The chiefs of police flier referred to above follows:]

TO: BUSINESS MEN IN THE METROPOLITAN AREA

The Chiefs of The Jefferson County and City of Louisville Police Departments, in an effort to keep their officers advised on shoplifting activity, have approved the attached alphabetically arranged flyer of subjects known to be active in this criminal field.

This flyer is being distributed to you, the business man, so that you may inform your security personnel to watch for these subjects. These persons have been arrested during 1971 and 1972 or have been active in various criminal fields in high density shopping areas.

Only the photograph and name of the subject is shown on this flyer, if additional information is desired, please forward a request in writing to:

PLANNING AND RESEARCH UNIT
LOUISVILLE DIVISION OF POLICE
633 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202

NOTE: ALL REQUESTS SUBJECT TO APPROVAL BY THE RESPECTIVE CHIEF OF POLICE.

This flyer's preparation is accredited to officers of the Second(2nd) Police District, Tactical Unit, and Detectives of the Criminal Intelligence Section, in cooperation with the Planning and Research-Development staffs of the Police Departments.

Sincerely,

Col. Edgar Paul
Chief of Police
Louisville Division of Police

EP/hr

Col. Russell McDaniel
Chief of Police
Jefferson County Police

RM/hr

NOVEMBER 1972
CITY OF LOUISVILLE
JEFFERSON COUNTY
POLICE DEPARTMENTS

ACTIVE SHOPLIFTERS

PEPPER ADAMS

JULIA MAE BOOKER

ARNOLD PAUL ALLEN

CAROL ANN BARTLEY

SANDRA LOUISE BOOKER

MARGARET L. ALLEN

WILLIAM EDWARD BARTON

JOYCE MAE BREWER

RAYMOND DOUGLAS ALLEN

DANNY JOE BEDENS

MARTHA ANN BRISCOE

SUSIE ALLEN

TRACY LEE BLANTON

LINDA BROOKS

ROBERT L. BALLARD

CAROL F. BOGGS

WILLIAM EDDIE BROOKTEN

DEBORAH BARBOUR

RICHARD L. BOLDEN

ALFRED D. BROWN

JAMES LARRY BARNETT

MELANIE ANN BOLTON

BILL(NMN) BROWN

LEON THOMAS BARNETT

ELIZABETH (NMN) BROWN

NOVEMBER 1972
CITY OF LOUISVILLE
JEFFERSON COUNTY
POLICE DEPARTMENT

ACTIVE SHOPLIFTERS

LORENZO (NMN) BROWN

WILLIAM FRANK BRUCK

PHILLIP BUCKMAN

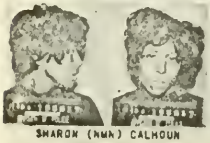
PHILLIP A. BUCKMAN

CHARLES M. BURNS

MARIE (NMN) BUSH

WILLIAM R. CAFFEE

MARK DOUGLASS CAIN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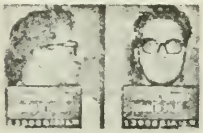
JOHN B. CAMPBELL


KENNETH R. CARLE

BILL C. COCHRAN

GILBERT COTTON

EDWARD CHARLES DAVIS III

KATHERINE HANCOCK DICKY

GARNETT DILL

MARY MAUPIN DILLET

EVERETT A. DIXON

BETTY McGILL DOWNS

FRANK LUTHER EVANS

MARY A. FAIR

WILLIAM B. FERRY JR.

LINDA FORD

KENNETH A. FROTTEN

HERBERT D. GILBERT

NOVEMBER 1972
CITY OF LOUISVILLE
JEFFERSON COUNTY
POLICE DEPARTMENTS

ACTIVE SHOPLIFTERS

SANDRA M. GOLDSMITH

HUBERT H. LINDSAY JR.

VERA M. GROVE

EDDARO M. HURT

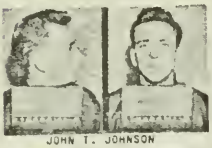
NORMA LEE LUCEY

FREDERICK C. HALL

CAROLYN JOHNSON

BARBARA A. LUNDEY

BUSTER HARRIS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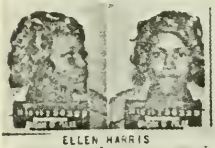
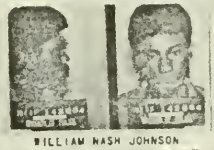
CARL S. MAGGARO


ELLEN HARRIS


WILLIAM WASH JOHNSON

JOHN LOUIS MALLORY

BRENDA HENDERSON

JAMES M. JONES

JAMES W. MALONE

CAROLYN J. HENDERSON

VERNA MAE JONES

CLIFFORD McCLENNAN

LYNN HOLBROOK

CLYDE KING

TYRONE L. McDONALD

LENORIX HOOSIER

JOHN McNARY JR.

NOVEMBER 1972
CITY OF LOUISVILLE
JEFFERSON COUNTY
POLICE DEPARTMENTS

ACTIVE SHOPLIFTERS

SAMMUEL McKEESE

ALPHA L. MILLER

DELORES B. MILLER

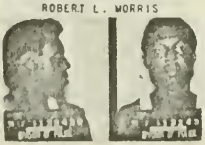
PAMELA LEE MILLER

ROBERTA MILLER

CAROL D. MIMMS

GARVER E. MOORMAN

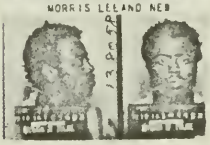
ROBERT L. MORRIS



WARREN NASH

WALTER NELSON

MORRIS LELAND NEB



CLARENCE O'DELL

HARRY T. PHELPS

PATSY ANN PHELPS

CHERYL L. PITTS

GEORGE O. POINTS

WILLIAM HENRY POWELL

KIMBERLY RAMOS

MARCIA E. RHODES

LOLITA RISINGER

DONALD E. ROBINSON

NOVEMBER 1972
CITY OF LOUISVILLE
JEFFERSON COUNTY
POLICE DEPARTMENTS

ACTIVE SHOPLIFTERS

EDWARD L. ROBINSON

MARY F. ROGERS

CHARLES D. ROSENBARGER

VITTORIO SAFFEL

NEYSA SCOTT

CLARENCE W. SEARS

ALTON O. SELF

THOMAS L. SINKHORN

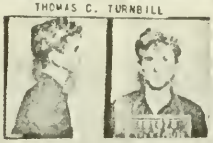
ANDREW J. SMITH

ODRIS SPENCER

KATHERINE SPENSER

IVORY STEVENSON

THOMAS C. TURNBILL


DAVID L. WADE

PATRICK WALSH

PAGE 5

ARTHUR WELLS

WILLIAM WELLS

WILLIAM PAUL WIEGAND

PAULETTE WIENTJES

ARTHUR WILLIAMS

LUCILLE ANN WILLIAMS

TERRY WILSON

GEORGE WRIGHT JR.

CELENA ZACHERT

Senator TUNNEY. Our next witness is Mr. Tom Ehrlich, who is president of the Legal Services Corporation, a distinguished former dean of Stanford Law School, and also a friend.

It is nice having you before us now.

TESTIMONY OF THOMAS EHRLICH, PRESIDENT, LEGAL SERVICES CORP.

Mr. EHRLICH. Thank you very much, Senator. It is a pleasure to be here.

Seventy years ago, when Roscoe Pound gave his famous speech, he began with a reminder of our obligation that "justice is to be done equally to the rich and to the poor. . . ." My own focus today is on the legal problems of the poor and on their needs for access to justice.

Twenty-nine million poor people in this country, people who have income below subsistence levels. For them economic survival is more than just a major issue; it is often the only issue. Only a small fraction of those 29 million poor people have any access to help when they face a legal problem. For all but that small fraction, justice is beyond reach. As a result, those who are poor in this country see that access to the legal system often does depend on money, that justice is not done equally to the rich and to the poor.

Most of the legal problems that poor people face are relatively uncomplicated matters involving housing law, consumer law, family law, and administrative benefits. For the individuals involved, however, these matters often assume crisis proportion. For most of us a defective car is a substantial irritant, but for a poor person it may mean unemployment. A poor person's problem with a landlord may mean no housing at all. The denial of social security benefits can be disastrous.

Access to justice for the poor then means much more than just a day in court. It means access to the legal system. It means a legal system that cares about the poor as individual human beings. But for most poor people today, the entire legal system is remote, impersonal, and inaccessible.

What are the solutions?

In the long run, coordinated revision of all parts of the legal system is essential. The rules of the system, the institutions of the system, the ways in which the individuals and groups seek justice through the system, and the legal services necessary to represent individuals and groups who seek justice through the system, all those need restructuring. In the short term, particular attention must be focused on the immediate need for substantially increased legal services for the poor.

THE RULES OF THE SYSTEM AS THEY AFFECT THE POOR

The most straight-forward approach to reducing the burdens on the courts and the pressures for more legal services is to simplify the law, to make it more uniform and simple in areas involving recurring issues. Some relatively routine aspects of family law, landlord and tenant law, and consumer transactions are prime examples. Disputes about Government benefits are equally significant. In these areas, simplicity and uniformity in the law can prevent controversy.

A price has to be paid for simplicity and uniformity, but it is far less than the price now paid by the poor because of their inability to understand, let alone to utilize complex legal language, complex procedures. Reform in this area would go a long way toward reducing the causes of popular dissatisfaction with the administration of justice.

The high cost of justice could also be substantially lowered by reducing the need to handle on a one-by-one handcrafted basis the large numbers of people and the large numbers of total transactions that result in high costs of legal services. Workers compensation is an example from an earlier era. No-fault legislation in many fields is an emerging illustration.

Similarly, the current legislative efforts to reduce the costs and reduce the time involved in uncontested family law matters are an important step that has to be taken.

THE INSTITUTIONS OF THE SYSTEM—THE COURTS, THE ADMINISTRATIVE AGENCIES, AND THE LEGISLATURES

For most poor people those institutions are wholly beyond reach. The courts are the most obvious example. They are clogged; delay and high costs result.

For the Federal courts, elimination of diversity jurisdiction is one obvious remedy. But it is also clear that a range of new dispute mechanisms is needed. Procedural fairness, after all, does not require judicial proceedings in every situation.

In particular we need more and better community courts and other community institutions for the settlement of small disputes within the communities where they arise.

A major category of cases involving the poor concern denial of benefits by administrative agencies. Those matters very often involve the most basic needs of the poor. Much ought to be done by the agencies themselves to resolve those matters within the agencies without litigation. Some agencies—the Interstate Commerce Commission is one example—have established public counsel to provide consumer representation in public proceedings. Similar representation is needed for the poor in those agencies that deal particularly with problems of the poor.

Legislatures also have been a prime cause of popular dissatisfaction with the administration of justice. The premium on introducing new legislation is so high, the gains from well-drafted bills apparently so low, that too often statutes are written with impregnable prose, and the result inevitably is seemingly endless litigation about what a legislature meant.

THE WAYS IN WHICH INDIVIDUALS AND GROUPS SEEK JUSTICE

Over the past few years a series of Supreme Court decisions—and we just heard about one—has sharply narrowed access to the courts with a substantial impact on the poor. Those decisions are reversible by legislation, and I urge considered attention to that possibility.

Two reforms seem to me to deserve particular attention. I believe that courts should be authorized to award attorneys fees in a large number of situations in which that is not now possible. Cases against administrative agencies brought to secure wrongful benefits are one; a wide range of public interest litigation is another.

Further, it is often true that the only way for the poor to obtain judicial relief is through class actions, and those actions have been curtailed in recent years. The inability to recover modest sums on the part of large numbers of poor people mean that they sink further and further into poverty.

LEGAL SERVICES FOR THE POOR

The reforms I suggested are important. But they will take substantial time, and even with them, legal advice will always be needed. Particularly for the poor that advice is essential—by lawyers, by para-professionals, by others trained in the law, by citizen education in common legal matters. All those are ways to provide that advice. Yet for most who are poor in this country, legal advice is wholly beyond reach.

My own focus is representation in civil matters, for that is the mandate of the Legal Services Corporation. But more attention is also needed to the problems of representation in criminal cases.

The first and most important remedy is substantially increased funding for legal services programs. The Legal Services Corporation has developed a 4-year plan to provide the equivalent of two lawyers for 10,000 poor people throughout the country. That does not sound like very much, and it is not, particularly in comparison to the 11.2 lawyers per 10,000 among the population generally, but even that minimum level will require substantially increased appropriations. The Corporation is seeking $140.3 million for the next fiscal year, and I urge your support for that effort.

Although the primary source of funding ought to be the Congress, in my view other secondary sources of revenue ought also to be considered. A small additional payment of 1 or 2 percent of a judgment, or a settlement, for example, might be collected by every Federal court and used to support legal services for the poor within its district. Legal assistance could be provided either through legel services programs or, where no programs exist, through private attorneys.

Alternatively, a modest surcharge might be added to all civil filing fees in Federal courts, again to be used for legal services for the poor. Several States have already adopted such laws. In Oregon, for example, a $5 fee is expected to produce about $210,000 per year. That could mean a 15-percent increase in funds for legal assistance to the poor in that State. A similar arrangement for the Federal courts, of course, could produce substantially more money.

Whatever our success in obtaining more funds for legal services for the poor, increased involvement by the private bar in providing those services without fee is also needed. One way the Federal Government might further that end would be to require private lawyers to devote a small percentage—say 5 percent, 80 to 100 hours a year—of their time to representing the poor on a *pro bono* basis as a condition of continued admission to the Federal courts. The amount of time involved for any one lawyer would be small, but the total impact on legal services for the poor could be very substantial.

Finally, one of the most important steps that Congress could take would be to enact and to fund a new Civil Justice Act, a civil counterpart to the Criminal Justice Act of 1964, which provides for representation in criminal matters. The new stature would expand substantially

access by the poor to the Federal courts. It would enhance the effectiveness of the access that now exists.

The new act would require that each U.S. District Court carry out a plan for furnishing representation to any plaintiff or defendant eligible to proceed *in forma pauperis*. Representation under the plan would include counsel and the support services necessary for effective access. It would provide for appointment of attorneys employed by legal services programs or private attorneys selected for a panel designated or approved by the courts, and would require compensation of those attorneys at reasonable rates.

While some may claim that such legislation would flood the Federal courts, it could be limited to cases in which a Federal right is claimed, and any additional caseload would more than be offset by eliminating diversity jurisdiction. The plan might also serve as a model for States which could adopt similar plans of their own.

It is true that the Criminal Justice Act of 1964 implements the constitutional right to counsel in criminal cases, and no constitutional right to counsel has thus far been held to exist in civil matters, though it well may be emerging, but in all events, the interests of impoverished civil litigants seeking to vindicate Federal rights seems to me compelling.

Several of the suggestions I have made can be carried out only by State and local governments, but many relate solely or significantly to the Federal Government, and for those I urge your immediate attention. Even for the others important steps can be taken through Federal legislation. Most obviously, incentives can be provided to States that adopt reforms to help cure the causes of popular dissatisfaction with the administration of justice.

One final point. Faced with so many burdens on our legal system, the temptation of many is to favor disenfranchising from the system those without muscle to push, particularly the poor and those other groups represented at this hearing. That temptation must be resisted. Reform of the legal system must be made with particular attention to the problems of the poor and the other groups that are here.

Reform is needed. The Federal Government should lead the way.

Mr. Chairman, with your permission, I would like also to add to the record statements by the National Clients Council, by the National Legal Aid and Defender Association, two groups that work very closely with the Legal Services Corporation in seeking access to justice for the poor.

Senator TUNNEY. Yes. They will be included in the record.

[The statements referred to follow:]

PREPARED STATEMENT BY THE NATIONAL CLIENTS COUNCIL

It is with considerable pleasure that the National Clients Council submits this addendum to the testimony of Mr. Ehrlich. We of the Clients Council have, I fear, a very skewed and biased view of the justice system as it relates to the poor. Simply put, we feel that the accomplishment of justice on behalf of a poor person is too often an accident, a momentary aberration in a system designed as the arena where the "civilized" might settle their disputes in an orderly, neat, *impersonal* manner.

The poor come to the justice system in multiple crisis. As the defendent in criminal matters, as the litigant or defendent in civil concerns, the poor approach the situation under great stress. Standing accused of a crime, fighting to stave off an eviction or foreclosure, dissolving a marriage all mark one as a failure in some way. Poverty itself is destructive of one's self-image. Combine a low self-

image with feelings of failure-and the presence of significant stress and frustration is an unavoidable end product. Dissatisfaction is too mild a term. To exacerbate the plight of the poor, these stress situations are resolved by this impersonal process, by a ritual totally unfamiliar to the person who has the most to lose. The police, court personnel, attorneys for both sides and judges all know the game. Only the poor person is life without the script essential to being at ease and participating.

Examine the "hardened criminal" versus the first offender or those in Family Court. The repeater stands at ease, mumbles the right phrases, shrugs when the process moves from one phase to the next. The newcomer to the system exhibits the classic behavior of a person under extreme stress. And nothing (and nearly always no one) in the system acts to humanize the impersonal—to explain away the confusion. In urban settings, this is a game where the super educated set the rules and the poor might as well be Ellison's *Invisible Man.*

As a further example of stress leading to frustration, let us look at communication levels. At best the English speaking are confused by the latinized jargon of the legal trade. The non-English speaking are absolutely cut off from any hope of comprehension. Where in the legislative process is the Bi-Lingual Courts Act?

At almost every turn these stresses are underlined, reinforced. The court rooms which the poor are shuffled are crowded an noisy with their first call-second call confusion. Attorney-client conferences must be held in the public halls, all this depersonalizes and detracts from the dignity of those who participate. Some enterprising attorney may one day bring a case contending that subjecting the poor to this environment is as much cruel and unusual punishment as is confinement in some of our prisons.

For the sake of brevity, I shall not even begin to comment on the poor who are not fortunate enough to seek justice in urban settings. No one on the subcommittee will, I am sure, consider justice done when the poor appear before an untrained justice of the peace who has no idea of (or any concern for) the rules of evidence or the constitutional safeguards inherent in the dispensing of justice.

At one time, the poor could, if they could gain access to an attorney, at least pursue their remedies beyond the reach of the justice of the peace and the state courts, on whose bench all too often sit the bigoted products of the spoils system. Now, to relieve the overcrowding in the federal courts, all kinds of procedural steps and judicial opinions are serving to close off even this limited access to the protection of the rights of the poor.

The poor know that IBM starts its defense of anti-trust actions in the comfort and relative opulence of the federal courts. The crimes of the rich are not heard in rural courtrooms or in the misdemeanor sections of the urban system. These are reserved for the poor. Detention cells house only those who can not raise bail or those few rich whose crimes are so heinous that no court would dare risk the public coutrage of returning them to the street. Yet, it is hard to believe that Patty Hearst was confined with the ladies of the evening or the junkies. Even in the pre-trail phase "the poor pay more."

The sub-committee raises a sound question when it asks about possible legislative remedies. There are, of course, things like the Bi-Lingual Courts Act which could relieve the frustration and the Clients Council would be pleased to offer in another more, detailed presentation further suggestions, should the subcommittee so desire. However, for now, we would like to focus on just one aspect.

It is, in our opinion, not a case of a need for additional legislation. The question at hand is the willingness of the Congress to use the power it already has and to wage the necessary fight to achieve the goals it desires. We refer to the right of the Congress to *appropriate* and to *oversee.*

One has only to examine the Legal Services Corporation Act to find a case in point. The Congress, in considering this legislation, recognized the need to provide an improved vehicle for the poor's access to justice. Inherent in this Act was the understanding that attorneys were an essential element of such access. The enabling legislation is two years old and we now watch as the program is starved by an appropriation which insures that frustration and rage will be the end products rather than justice.

Similarly, the appropriation level for the federal courts and supportive services are further examples of this starvation technique. Where is the oversight of the Congress when the funds appropriated for LEAA go to hardware?

A bold Congress might consider legislation which would establish a federal competency-based standard for admission to the bar. Pilots are licensed by a

single federal competency standard and states do not require separate certification before permitting use of state-owned airports. Minority attorneys offer some possibility of lessening the stress-produced dissatisfactions—yet in many jurisdictions the organized bar is a closed shop to which none but a select, fortunate few minorities need apply. Court suits brought in such places are too often viewed as threats to the order of things—an assault on the old-boys club. Without legislative guidance, the federal courts have asserted that they lack jurisdiction to intervene. But then, the poor know that the rich seldom seek representation from minority attorneys. So who cares how many people from poverty backgrounds could become a tool to reduce the miscommunication.

The resolution of the problem is, in the Clients Council's view, most difficult. Difficult because there are no real culprits. The fault lies not in the judges or the attorneys, although they are contributers. Money and oversight are not the answers, although they would help. The problem is the lack of will, the lack of a sense of purpose, the failure to identify the multitude of individual and collective problems and apply the resources it would take to resolve them.

We fool ourselves if we make our attack on the problems less than an all out effort. We do everyone a disservice if we allow the present system to pass for justice where the poor and minorities are concerned.

Thank you for the opportunity to comment.

Prepared Statement of Frank N. Jones, Executive Director, National Legal Aid and Defender Association

Mr. Chairman: On behalf of the National Legal Aid and Defender Association, I am grateful for the opportunity to present this statement on this important topic. Mr. Chairman, you correctly noted in your invitation to testify that last month's "Roscoe Pound Revisited" Conference in St. Paul treated this subject as though it were primarily an *administrative* problem, to be addressed by judges and lawyers. Fortunately, these hearings afford an opportunity for a much broader spectrum of views; I am confident that the record of these heerings will demonstrate that the causes of popular dissatisfaction with our justice system run far deeper than mere inefficiency. Indeed, the primary "dissatisfaction" on the part of the 30,000,000 poor people who make up NLADA's constituency is the threshold problem of *access* to the system of justice. Until this fundamental barrier is overcome, the problems of court administration remain secondary to the nation's poor.

The National Legal Aid and Defender Association has been in the forefront of the battle for increased access to the justice system for poor people since its inception in 1911. NLADA is the only national organization which devotes its entire resources toward achieving the goal of equal justice under law for the poor; we are the national voice of the poor in matters concerning the justice system, comprising over 1,500 member programs which provide legal assistance to indigent persons.

In the civil sector of the justice system, we are entering a new era, after years of political turmoil. With the establishment of the Legal Services Corporation, due in great measure to the efforts of NLADA, there is at long last an independent government body with a clear mandate to provide adequate civil legal assistance for the nation's poor people. We shall continue to work along with thed Legal Services Corporation in fulfilling this challenging mandate, assisting when asked and prodding when necessary. The combined efforts of NLADA and the Corporation offer the best opportunity to date to achieve adequate civil legal assistance to the nation's poor.

Unfortunately, the advent of the Legal Services Corporation does not solve the problem of access to the justice system for poor people. Contrary to popular misconception, the poor are *not* guaranteed comprehensive legal services. Only 59% of the nation's poor people are even nominally covered by existing civil programs of those covered, an average of just $2.16 per person annually is available! The most recent national data available indicates that 0.76 legal services attorneys are allocated for every 10,000 poor people, and that less than 15% of the approximately 7,000,000 legal problems arising for indigents each year are handled by legal counse. (Statistics for F.Y. 1974, from *The Legal Services Program: Resource Distribution and the Low Income Population*, Bureau of Social Science Research, 1975).

The critical importance of adequate legal representation was well stated by Dean Roger Cramton, Chairman of the Legal Services Corporation's Board of Directors, in his address to the 1975 NLADA Conference in Seattle: "(w)here the consequences of failure in civil litigation are sufficiently grave, an individual is denied due process if he does not have the guiding hand of counsel at every step of the proceedings. Without such assistance, he simply has no meaningful 'access' to the justice system."

These "consequences" can include eviction from one's dwelling; loss of custody of a child; garnishment of wages; denial of welfare or social security benefits; denial of medical and hospital care; and a lengthy list of similar burdens borne by the unrepresented poor.

Often, well-intentioned legislation aimed at increasing indigents' access to the justice system is rendered ineffective through failure to provide for legal representation. The Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 et seq., admirably provides for the right to counsel in administrative hearings governing the assessment and educational placement of mentally handicapped children. However, unless funds are made available for indigent families to retain counsel, and unless legal services programs receive appropriations sufficient to allow them to handle such cases, this and many similar "rights" to counsel are only paper rights.

Unfortunately, Supreme Court decision expanding the right to counsel in criminal proceedings (*Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 35 (1972)) have not been extended to civil proceedings. Indeed, recent decisions have brought about new civil barriers to the justice system for poor people, in addition to the failure to extend the right-to-counsel doctrine to the civil side. In *United States v. Kras*, 409 U.S. 434 (1973), the Supreme Court refused to waive filing fees in indigent bankruptcy petitions; waiver of fees was also denied in appeals from adverse public assistance determinations in *Ortwein v. Schwab*, 410 U.S. 656 (1973). Just as harmful to the cause of increased court access for the poor was *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974), which severely restricted the use of the class action, the most effective procedural method for affirmative litigation on behalf of the poor.

Perhaps the most telling judicial blow to the movement for increased access to the justice system was the Supreme Court's holding last year in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). This decision eradicated the "private attorney general" doctrine, which permitted attorney's fees for prevailing parties in actions to uphold the public interest. Under this doctrine, counsel was available in cases involving major poverty law issues to poor people who could not otherwise afford legal representation.

The *Alyeska* case brings me to the first of NLADA's recommendations for Congressional action to remedy the poor's dissatisfaction with the administration of justice:

1. NLADA strongly supports Senate passage of S. 2715, the Kennedy-Mathias bill, which was reported out of the full Judiciary Committee on May 13. As you know, this bill would permit attorney's fees in successful federal court reviews of administrative agency decisions, when such actions uphold the public interest. In addition, S. 2715 would appropriate funds for participation by poor people and other citizen groups in federal administrative agency rulemaking proceedings, thus, for the first time, affording poor people a systematic opportunity for input into decisionmaking which affects so many aspects of their lives.

2. NLADA urges the Appropriations Committees of both houses of Congress to grant the requests of the Legal Services Corporation for supplemental and annually increasing funds to extend legal services program coverage to indigents throughout the nation; we urge full support for the F.Y. 1977 budget request of $140–3 million.

3. NLADA proposes that all future legislation granting new substantive and procedural legal rights to poor people include funds for provision of counsel to ensure the protection of those rights.

4. NLADA urges the Judiciary Committee to revise Rule 23 of the Federal Rules of Civil Procedures to ensure that Class Actions are readily available, and financially and logistically attainable, as a remedy in the Federal Courts.

5. NLADA urges the Judiciary Committee to revise the Federal Judicial Code so as to provide for the automatic waiver of fees and costs to indigent parties in all actions in the Federal Courts.

In the criminal defense sector, much dissatisfaction with the justice system exists on the part of poor persons accused of crimes. According to a 1973 survey

conducted by the National Legal Aid and Defender Association, two-thirds of the counties in the United States, particularly in rural areas, lack any organized system for providing representation to poor persons in criminal cases and rely on ad hoc judicial appointment of counsel. The basic problems in these areas include the lack of availability of counsel for appointment, inadequate compensation for court appointed counsel, and lack of training for these lawyers in the specialized field of criminal defense.

In the remaining counties, some form of organized defense system exists, whether it be a public defender office, a not-for-profit defender corporation or legal aid society, or a coordinated assigned counsel system. However, these programs are severely hampered in their efforts to provide effective defense services to the poor.

The number one problem in defender offices is the lack of sufficient funding. In the great majority of jurisdictions which do provide organized defense services, funding comes from the county tax base, which is frequently low, resulting in inequality of representation within a particular state. Inadequate funding leads to excessively high caseloads per lawyer, inadequate investigation of cases by the defense, excessive and uniformed plea bargaining, and the lack of career incentives to retain skilled practitioners in the field of defender work.

A second problem faced by defender offices, and recognized by their clients, is political and judicial influence upon the operation of their offices. Judges and local officials often see defender hiring as a means of handing out patronage. Defender offices which submit to political hiring practices may be rewarded by an increase in staff. In some jurisdictions this practice has been avoided through enlightened procedures whereby the defender is selected by an independent board. However, even these offices are frequently threatened with extinction by virtue of diminishing county resources and competing bids from outfits which offer to provide services, however inadequate for a lesser cost.

In recent years, the resource which both jurisdictions lacking organized defense programs and jurisdictions wishing to upgrade their defender systems have turned to for support is the Law Enforcement Assistance Administration. LEAA is the principal source of federal funding for state and local defender offices. However, the most recent study of LEAA funding, conducted through American University, demonstrates that less than 2% of the limited LEAA funds have been allocated to defense projects. Moreover, due to the legislative-mandated funding scheme under which LEAA operates, defender funding is for a limited time period—usually, 2 to 3 years. Thus, those defender programs which have received LEAA funding must later be funded by their county or state treasuries or become extinct. A more permanent source of federal funding must be found to augment inadequate local funds, especially in poorer counties.

As many as 4 million poor persons annually are charged with a criminal offense and represented by a defender or appointed counsel because they are unable to afford to retain private counsel. These people are frequently herded through a "cafeteria-type" justice system wherein, due to inadequate resources, they are given little time to confer with a lawyer and may be influenced to plea guilty because of lack of preparation of defense counsel or waivers of counsel which may have been induced as a result of the unavailability of counsel.

One important factor in the reduction of citizen access to the criminal justice system has been a series of recent Supreme Court decisions affecting the right of indigent defendants to counsel at public expense. The right to counsel is the foundation of all other constitutional rights because without counsel the average defendant is not aware of and will probably not assert the substantive and procedural rights that are his. Recent decisions involving the right to counsel have reversed the earlier trend towards providing poor people in criminal proceedings with the same advantages enjoyed by the rich. Previous cases such as *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *Argersinger v. Hamlin*, 407 U.S. 25 (1972) extended the right to counsel at public expense to all cases where imprisonment is a possible punishment. Although the general holdings of these cases remain, the idea of full representation by counsel has been substantially eroded.

The most far-reaching decision is *Ross v. Moffitt*, 417 U.S. 600 (1974) holding that indigent defendants are not entitled to court appointed counsel in the pursuit of appellate discretionary review. This case severely limited the holding in *Douglas v. California* which provided for counsel on appeal. The defendant in *Ross* was provided counsel for trial and for one appeal, but was not allowed representation at public expense for a petition for writ of certiorari to the state Supreme Court. The Fourth Circuit unanimously held that the defendant did have a right

to counsel for the whole appeals process, asserting that in a criminal case all avenues of appeal open to a wealthy defendant should be open to a poor one. *Moffitt v. Ross*, 483 F. 2d 650 (4th Cir. 1973). The Supreme Court reversed, holding that an indigent was entitled to counsel only for the first step of the appellate process.

In *Gerstein v. Pugh*, 95 S. Ct. 854 (1975), the Court indicated that the right to counsel did not extend to a hearing before a magistrate to assess probable cause for a warrantless arrest and subsequent detention. The Court made the dubious assertion that such a probable cause hearing is "non-adversary," and concluded that it was therefore not one of the "critical stages" of a criminal proceeding at which counsel is required by *Coleman v. Alabama*, 399 U.S. 1 (1970).

In the past three years, Supreme Court decisions have restricted the right to counsel in three specific contexts. These decisions are important for the situations in which one who may be punished by law is without legal assistance, and they indicate a general attitude which may further limit the right to counsel in the future. The Supreme Court upheld denial of counsel: in summary courts-martial, even though sentences of imprisonment and imprisonment at hard labor could be imposed, *Middendorf v. Henry*, 18 Cr.L. 3142 (1976); in prison disciplinary proceedings, for conduct punishable as a crime under revocation proceeding, except under certain stringent circumstances, *Gagnon v. Scarpell* 411 U.S. 778 (1973).

A decision which adversely affects the right to counsel in State courts is *Fuller v. Oregon*, 417 U.S. 40 (1974), where the Court held a defendant's parole would be made conditional on his repayment of appointed counsel and investigator fees should he become able to do so. *Fuller* will doubtless cause many states to adopt the sort of 'recoupment" statute used in Oregon. First, no other debtor could be sent to jail for defaulting, but Fuller's probation could be revoked for that reason. Second, and more important as a constitutional defect, is the "chilling effect" of the statute: the defendant may hesitate to accept an appointed attorney when the attorney comes with an open-ended bill for services. Further, if the defendant accepts counsel, he may be reluctant to incur the added expenses of trial or of trial by jury. The result is a built-in inducement to the citizen to waive his constitutional rights.

The combination of adverse Supreme Court cases and the inability of states and counties to provide adequate resources to meet existing mandates for the provision of counsel operates to alienate many Americans who pass through this Nation's criminal courts. As is the case in the civil sector, dissatisfaction with the justice system arises from a failure to obtain the adequate counsel which can make "justice" a reality.

I am confident that the Committee will fully consider this testimony and recommendations, for I have no doubt that the members of the Committee, like the majority of Americans, feel that popular dissatisfaction with the justice system is far more fundamental than a matter of court administration. For the poor people whom NLADA represents, dissatisfaction with our system of justice will not diminish until access to that system becomes a reality.

Thank you again, Mr. Chairman, for this opportunity to present our views on these important issues. And, of course, we would be happy to provide any further information or assistance the Committee and staff thinks appropriate.

Senator TUNNEY. Thank you, Mr. Ehrlich. I want to make a couple of observations and then ask a question of you.

It has been my impression that those persons who are in private practice for financial gain are reluctant, once they achieve a certain status in their profession, to give of their time for *pro bono* services. They have many clients that are demanding their time. They have to choose among clients as to the amount of time that they are going to devote to any particular case. Therefore, it would seem to me these lawyers would resist giving *pro bono* services to the poor, even if it were 5 percent of total services, and then one might conclude that if they were forced to do it, they would treat such cases in a cursory manner: not giving their full attention to *pro bono* cases, being more concerned about the high paying client. That observation may be based upon some false premises. I would like your opinion on that, but, first, as an observation it seems to me that those legal service

lawyers that I have met who are working for the California rural assistance program, the Indian legal service program, and other public service programs for lawyers, tend to be highly motivated, they really have a desire to be of service to the poor, so that if you were going to choose between an expansion of a program such as the Legal Service Corporation, or, a requirement that lawyers give 5 percent of their time to the poor as a precondition of being admitted to the Federal Courts, for example, that it would perhaps be best to come down on the side of expanding the Legal Services Corporation, rather than going the other route.

As I have said, those observations that I have made may be based upon false premises, and I would just like to get your evaluation.

Mr. EHRLICH. I agree completely, Senator, that if we had to choose between expanding legal service programs with staff attorneys and looking to the private bar for *pro bono* efforts, we should choose the former. There is no more dedicated group of lawyers than those who are working in legal services programs. They are the pride of our profession.

At the same time, I do not think we have to choose. We must expand legal services programs for the poor. That is and always will be the mainstay of access to justice for the poor. At the same time private lawyers can serve an important role—and I believe they ought to serve that role—as a supplement, particularly in rural areas and other parts of the country that have no legal services programs.

Senator TUNNEY. Do you think that they would serve competently and would represent the rights of the poor in an effective fashion?

Mr. EHRLICH. You raise the concern that they might shortchange their poor clients because they would not be paid. They would, of course, have a professional obligation under the "Canons of Ethics" to represent those clients just as they represent every other client. It is also true that we need, as you have said, far more effective enforcement mechanisms within the bar to insure that lawyers do perform their professional obligations. But from talking to a great many members of State and local bars, as well as the American Bar Association, I am convinced that if such an obligation were in existence, private lawyers would fulfill it and that the bar would support it without shortchanging their clients.

Senator TUNNEY. Why has not the bar put more effort into this kind of a forum?

Mr. EHRLICH. We have come a long way, I think, in the last 10 years. Last summer in Montreal the American Bar Association established that lawyers have an affirmative obligation to provide public service. That was a major step forward, and it was lead by a group of those within the American Bar Association who believe that lawyers in private practice ought to do more. That obligation has yet to be quantified in terms of specific time or to have muscle behind it, but that, too, I think, will come.

Senator TUNNEY. One of the areas that you did not address during your remarks was research. It strikes me that there is a dearth of hard data on precisely who is served by the legal system and who is not. We also do not know with any precision what the costs are of coverage of legal representation in this country.

Do you agree that such a study ought to be completed?

Mr. EHRLICH. I agree completely. The sad truth is that there is little research that has been done on the amount of representation, the cost of representation, the quality of representation, or the ways in which average citizens interact with the legal system and make use of it or fail to make use of it. It is very important for those studies to go forward, and I hope very much that this subcommittee will sponsor some of them. Others dealing particularly with the problems of the poor are appropriate for the Legal Services Corporation to sponsor. And I hope we can do some of this work together.

Senator TUNNEY. The American Bar Association, among others, proposes the establishment of a National Institute of Justice as our Government's impartial, nonpolitical, independent clearinghouse for research, getting facts on the administration of both civil and criminal justice in the United States.

What do you think of the idea?

Mr. EHRLICH. I think it is an excellent idea, and I hope it goes forward quickly. The agenda set forth for the Institute—which one might have hoped would have been done within the Justice Department, but is not done there—can only be done, I am now convinced, by a new and independent entity along the lines of the proposed Institute.

Senator TUNNEY. Have any law schools or any foundations made an attempt to develop research on the administration of criminal justice which you feel would be helpful to the subcommittee's activities?

Mr. EHRLICH. At a number of law schools around the country, research is going on that no doubt relates to the kind of work the subcommittee is doing. One problem is the lack of a clearinghouse, and that is part of what a national institute ought to be doing. I know of no law school, however, where studies are now going on concerning the costs, quality, or reach of legal representation.

Senator TUNNEY. You have been the president of the Legal Services Corporation for what, 6 months now?

Mr. EHRLICH. Somewhat over 4 months.

Senator TUNNEY. In the time that you have been president, what do you think that the Legal Services Corporation has been able to do in providing of legal services for the poor, that had not been done previously?

Mr. EHRLICH. For 5 sad years, Senator, funding for all legal services was frozen while some sought to eliminate legal services for the poor, if not the poor themselves. It was evident to a good many, and you were one, that a new independent entity was needed to give a sense of tomorrow—and the day after tomorrow—a sense of permanence to access to justice for the poor, and to gain substantially more resources devoted to that end. That has been the major mission in the last 4 months. We are seeking a substantially increased appropriation over the $88 million that the Legal Services Corporation received for fiscal year 1976, and we hope that we will, with that appropriation, be able to reach areas of the country that do not have legal services.

Senator TUNNEY. I want to thank you very much, Mr. Ehrlich, for your statement. You have given to the Congress an excellent blueprint for legislation to assist you and those of your associates who are trying to bring a greater degree of legal help to the poor, and I would

like at some future time to go over with you in greater detail some of the recommendations that you make—particularly with respect to a prioritization of some of these points—in the hope that we could move some of the suggestions through the Congress in the near future.

Mr. EHRLICH. It will be a great pleasure to do that. I am grateful for being asked to be here.

Senator TUNNEY. Thank you very much. I appreciate it.

Mr. EHRLICH. Thank you.

Senator TUNNEY. Our next witness is the Honorable Julian Bond, State senator from Georgia, who is accompanied by John Lewis, executive director, Voter Education Project; Armand Derfner, attorney, Charleston, S. C.

Welcome, Senator Bond.

TESTIMONY OF JULIAN BOND, STATE SENATOR FROM GEORGIA

Mr. BOND. Thank you, Senator.

Senator TUNNEY. It is a pleasure having you before our subcommittee. Your reputation precedes you, and we feel that we are privileged to have the opportunity to hear from you.

Mr. BOND. Thank you a great deal.

Mr. Chairman and members of the subcommittee, I am Julian Bond, State senator representing the 39th District in Atlanta, Ga. With me are John Lewis, director of the voter education project of Atlanta, Ga.; and Armand Derfner, a lawyer of Charleston, S.C.

For blacks and other minorities, dissatisfaction with the administration of justice is nothing new. Throughout our history we have seen the system of justice perverted to the same illegitimate ends as the dominant political process in making certain that those who have most should keep it, while those who have least should stay that way.

I would like to limit my focus today to one area of concern, but one which I think is vital. That area is the special need for the Federal Government, especially the Federal courts, to be responsive to the claims of blacks and other minorities for enforcement of fundamental rights of equality and freedom. I have always thought that under our Constitution courts have a special obligation to be alert to protect minority rights precisely because unlike the majority, we cannot rely on the normal workings of the political process.

Today there are unmistakable signs that the obligation is being disavowed, and to those of us who have grown up in a period when we thought Government was beginning to live up to its responsibilities, the present trends are the beginning of a national tragedy.

Unquestionably, my views are shaped by the times I have seen. During these times, beginning roughly with the 1954 school desegregation decision, the system of justice began to change. The Constitution was rediscovered, Congress began passing new laws to back up our efforts to gain equal rights, the Federal courts began protecting our rights, the Justice Department began to answer our telephone calls, and slowly to put people to work on the side of what we thought was the right.

The effect of all this was enormous. We had not ever seen anything like it. What was just as important, the sheriffs, the mayors, and lunch-counter owners of the South had not seen anything like it,

either. Blacks were just as frustrated as ever by the inability to get anything done by local efforts, and we were not alone. We began to get a dim feeling that we really could help bring about change.

The mood is radically different today. There is enormous contempt for Government, for institutions, and especially for the laws. With that contempt goes an enormous cynicism and distrust, a rejection of any idea of getting involved. There is no idea of trying to change the system, but of simply staying out of its way. The feeling is, don't get sad, don't get mad, we'll just get by.

Now, obviously, a lot of this is reaction to the political system, and much of it does not have to do with the courts or the system of justice, at all. But to blacks and other minorities, courts are not the distant abstractions you may think. It was the courts that first began to respond to our rights even before the Brown decision; it was the courts that ended white primaries, white juries, and the idea of white schools.

Political scientists do not usually think of courts as the most democratic institutions in the society, but to black people for a generation the courts were the essence of our democracy, the main symbol of the fact of our belief that we were finally becoming a part of the Nation. Today that sense is going fast.

In 1965, when I was first elected to the Georgia House, the other members refused to let me be seated because I had some things to say about the Vietnam war, things that very few people disagree with today. The Supreme Court held that the Georgia Legislature had no business excluding me and disenfranchising the voters in my district for exercising my right of free speech. That was only 11 years ago, but I was lucky that it happened then, because I have a real feeling that if the case came up today, we would be told that the Federal courts are not in the business of running State legislatures and that we should take our complaints somewhere else.

For many people, for many issues, there is nowhere else.

I do a great deal of traveling, more than I would like, and I keep telling my audiences that they have to get involved, but that if they do, they can make things change. I would like to be able to keep on believing that.

Senator TUNNEY. Thank you very much, Senator Bond.

Given the despair that you have described, I assume that legislative and administrative remedies are the only hope for the poor and minorities. Can you describe what you feel that the Congress ought to do in making available greater remedies to the poor?

Do you have any thoughts on the subject of what precisely the Congress could do?

I am not asking now for detailed legislation, but for the general areas where you feel it would be important for Congress to act.

Mr. BOND. Senator, in part of my statement that I did not read, I mentioned that I am not an attorney and tried to indicate that that is neither vice nor virtue.

I cannot offer specific recommendations, but I would like to think that the Congress would once again make the Federal judiciary a responsive and sympathetic referee in disputes between citizens at the lower level.

There was a time 10 years ago when those of us who were involved in the civil rights movement in the South felt fairly confident that

in the event of an insoluble dispute over first amendment rights, the right of free speech, the right to peacefully petition the Government, that the Federal judiciary would always be an impartial, however sympathetic referee. And now one gets the real feeling that that is no longer the case, that disputes which once were handled very easily and very quickly at the Federal level will now be dismissed and sent back to the State courts where the result is often in opposition to those people who want to expand their rights.

[The prepared statement of Mr. Bond follows:]

PREPARED STATEMENT OF HON. JULIAN BOND, STATE SENATOR FROM GEORGIA

Mr. Chairman and members of the committee, I am Julian Bond, State senator representing the 39th district in Atlanta, Ga. With me are John Lewis, director of the voter education project, of Atlanta, Ga., and Armand Derfner, a lawyer, of Charleston, S.C. I appreciate the opportunity to appear here today, and would like to proceed with a short statement, following which Mr. Lewis will have a statement of his own, and then we will try to answer any questions you may have.

As I understand the reaction to Roscoe Pound's speech to the American Bar Association in 1906, he got his audience mad just by saying that the people were dissatisfied with the administration of justice. That may have been surprising to the lawyers and judges in his audience, but it couldn't have been surprising to the people.

Especially, it couldn't have been surprising to black people and those of other minority groups. For blacks and other minorities, dissatisfaction with the administration of justice is nothing new. Throughout our history, we have seen the system of justice perverted to the same illegitimate ends as the dominant political process in making certain that those who had most should keep it, while those who had least should stay that way.

You have many experts here today who will give you detailed legal analyses of the topics you are studying. I should say that I am not a lawyer. Whether that is a vice or a virtue changes with the times, and it is not clear to me what type of time we are in now. Today, though, I would like to take advantage of my nonmembership by limiting my focus to one area of concern, but one that I think is vital.

That area is the special need for the federal government, especially the federal courts, to be responsive to the claims of blacks and other minorities for enforcement of fundamental rights of equality and freedom. I have always thought that under our Constitution, courts have a special obligation to be alert to protect minority rights, precisely because, unlike the majority, we cannot rely on the normal workings of the political process.

Today, there are unmistakable signs that that obligation is being disavowed, and to those of us who have grown up in a period when we thought government was beginning to live up to its responsibilities, the present trends are the beginning of a national tragedy.

To those of us who have only recently begun to have a real place in this society, the present trends tell us not only that we will stop advancing, not only that the gains we have made are being erased, but that our brief welcome is almost worn out.

Unquestionably, my views are shaped by the times I have seen. During these times, that began, roughly, with the school desegregation decision, the system of justice began to change. The Constitution was rediscovered, Congress began passing new laws to back up our efforts to gain equal rights, the federal courts began protecting our rights, the Justice Department began to answer our telephone calls and, slowly, to put people to *work* on the side of what we thought was the right.

The effect of this was enormous. We hadn't ever seen anything like it. What was just as important, the sheriffs, mayors, and lunchcounter owners hadn't ever seen anything like it either.

It meant there was someone backing us up, to confirm the fact that we were right. Blacks were just as frustrated as ever by the inability to get anything done by local efforts, but we were not alone. There was a sympathetic referee, if I can borrow a term of John Lewis', to whom we could turn for support.

We began to get a dim feeling that we could really help bring about change, and this feeling extended not only to the civil rights movement but also to people who

were pretty much alienated from government. As time went on, and as we learned more, and people began to redevelop a new contempt for government and its institutions, there was still a feeling that it could be changed.

The mood is different today. There is enormous contempt for government, institutions, and especially the law. With that contempt goes an enormous cynicism and distrust, a rejection of any idea of getting involved. There is no idea of trying to change the system, but of simply staying out of its way. The feeling is "Don't feel sad, don't get mad, we'll just get by."

But that's not really true, because people are getting mad. And it's a more dangerous anger, because it follows a time when we started beginning to see how things might change. I think we are sowing the seeds of social chaos, and if things don't change I am going to be afraid of what we face.

Now obviously a lot of this is reaction to the political system, and much of it doesn't have to do with courts or the system of justice at all. But to Blacks and other minorities courts are not the distant abstractions you might think. It was the courts that first began to respond to our rights, even before the *Brown* decision. It was the courts that ended white primaries, white juries, and the idea of white schools. Remember also that the federal judges were in some ways the closest federal representatives, and the most visible. A federal lawsuit was never very far from our thinking of what to do if we ran into brick walls.

When we thought of remedies and solutions, very often a federal court order was an important ingredient. The federal courts represented a constant reminder that someone was listening.

Political scientists don't usually think of courts as the most democratic institutions in a society, but to Blacks for a generation, the courts have been the essence of our democracy, the main symbol of the fact—or our belief—that we were finally becoming a part of this Nation.

Today that sense is going fast. The lawyers tell us the federal courts are inventing new doctrines to justify why they don't even have to hear our cases. I am not an expert on these details, but I read that the Supreme Court has decided that a Black defendant isn't entitled to ask his jurors whether they will be prejudiced against him because of his color. I read that the Voting Rights Act doesn't prevent small southern towns from discriminating against us as long as they are careful not to make things worse than they were in 1965. I read that if the police in Louisville go around calling you a crook, or if the police in Philadelphia go around beating people up, or if the judge and prosecutor in Cairo deliberately bring false charges and set unreasonable bonds just to shut Blacks up—the federal courts are not interested in any of these. They are closed.

In 1965, when I was first elected to the Georgia House, the other members refused to let me be seated, because I had said some things about the Vietnam war—things that very few people disagree with today. The Supreme Court held that the Georgia legislature had no business excluding me (and disfranchising the voters in my district) for exercising my right to free speech.

That was only eleven years ago, but I think I was lucky that it happened then because I have a real feeling that if the case came up today, we would be told that the federal courts are not in the business of running state legislatures and that we should take our complaints somewhere else. Well, for many people, and many issues, there is nowhere else.

I do a lot of traveling, more than I'd like, and I keep telling people that they have to get involved, but, that if they do, they can make things change. I'd like to be able to keep on believing that.

Senator TUNNEY. It was my understanding that Mr. John Lewis may have a short statement.

TESTIMONY OF JOHN LEWIS, EXECUTIVE DIRECTOR, VOTER EDUCATION PROJECT

Mr. LEWIS. Senator Tunney, I want to thank you for the opportunity to present these brief remarks on causes of popular dissatisfaction with the administration of justice in this Nation.

Since I am not a lawyer, I do not come here as an authority on the judicial system, but rather, with some very real concern about the administration of justice in this Nation.

In my work as executive director of the voter education project, I come in contact with thousands of poor people, minorities, nameless individuals, people who have been left out and left behind in this country. In the midst of affluence, their dreams to share equally in the wealth and resources of this Nation remain unrealized.

For a brief and fleeting moment in the decade of the 1960's, the Federal Government gave minorities and poor people a sense of hope. In the great civil rights struggle, there were some outstanding instances in which the rights of black citizens were affirmed and protected. This first ray of light and hope since the darkest days of slavery came about, not because of the sudden enlightenment of the Nation's leaders and the keepers of the courts, but because a massive, courageous, and dedicated movement demanded it and threatened to throw this Nation into total chaos if serious attention was not given to their longstanding needs.

During the 1960's, we made some gains in this Nation. We opened a few doors which had been closed for decades and, for a moment, it seemed the promises of the Constitution and the Declaration of Independence and the Bill of Rights might indeed apply also to blacks, chicanos, native Americans, Puerto Ricans, and even to women. But, today, as we celebrate the 200th birthday of this Nation, minorities no longer experience a sense of movement, a sense of progress, a sense of hope. Too often the dream has been stifled by the politics of expediency and the civil rights laws which were enacted in the 1960's are not vigorously enforced. Affirmative action programs on the part of the Federal Government are inadequately conceived or totally nonexistent. And as minorities return to the courts to check the backward drift of the Federal bureaucracy, we are stunned by the realization that our judges are more concerned with easing crowded court dockets than continuing to expand the basic rights of people who are still struggling to attain a position of equal opportunity.

We are beginning to be asked again, in this Bicentennial year, "Just what do you people want from the American society?" Our answer now is the same as yesterday, we want a fair share and a fair shake from the affluent American society which our lives, our blood, our struggles, and our sacrifices have helped to build.

We are sick and tired of seeing the courts dispense added advantage to the very rich and the already powerful ruling elite of the United States. We are tired of having to shoulder the total burden of pressing our own grievances in a legal and political system where the cards are stacked against us. We are tired of paying a disproportionate share of tax dollars to perpetuate a political and legal system where we find no justice for ourselves. We are tired of losing court cases because we cannot afford the legal fees. We are tired of having our land taken, of being unable to provide adequate food, clothing, housing for our families, and education for our children. We are tired of being taken for granted in an economic system where wealth is flaunted in our faces by those who control our lives.

Just as the legal system of common law originated as a device of absolute control by the rich and the powerful, we still have a peasant class in America and that presents a very dangerous situation.

From across this Nation, I sense a growing restlessness from the ghettos of Chicago to the barrios of California, from East Harlem to

the western reservations, from the cotton curtain of the South to the raped and ravaged region of Appalachia, there is a growing frustration, a dying sense of hope, and a smoldering resentment which may explode with a fury that we have never seen before in the history of this Nation.

What we hear being described today as a growing cynicism, distrust of Government, and apathy on the part of the electorate, is, in my estimation, a quiet and growing anger which always breeds when human potential is denied.

It seems that we must now gird ourselves for a long, hard winter as high placed voices begin to recite the litany of the elite. They are saying that minorities are moving too fast; that we should be satisfied with the crumbs we have been able to gather from the table of plenty. They are saying the courts of this land should not be the battleground for further advances of human rights. But I say to you today, if these rights remain unfulfilled and we see the clock turned backwards, then the battleground will shift from the courts and the legislative process and the so-called avenues of justice back into the streets of this Nation.

There are those who would return the destiny of minorities and the poor back to the sovereign control of demagogues who have only used their misplaced authority to perpetuate racism and injustice. We've been in too many jails and prisons, fought too hard and long, lost too many of our finest leaders and suffered too often as victims of injustice to return quietly to the chains and disillusionment of the past.

There may well come a time when thousands of Americans will again engage in campaigns of civil disobedience in the face of unjust laws, lack of legal redress, and a lack of justice in the American system. The next time the battle will not be limited to the forces working for civil rights or civil liberties, but will include Americans who are taxed without representation, consumers who are bilked by the frauds of the marketplace of materialism, and environmentalists who see our natural resources shrink in direct proportion to the profits and gain of multinational, self-interest corporations.

All around the globe, there is a terrible hunger for self-determination, for the freedom to grow and develop the awesome capacity of human potential. This great movement will not be defeated, at home or abroad. The American minorities are sick and disillusioned by the injustice of a Nation whose so-called leaders commit the military might of the United States against their brothers and sisters in the liberation struggles of Africa, Asia, and South America. We are at the crossroads in both our domestic and foreign policies. If the moral, legal, and political weight of the American Government is not placed on the side advancing rather than repressing the growing aspiration of the dispossessed, there will simply be hell to pay.

Thank you very much, Mr. Chairman.

Senator TUNNEY. Thank you. The importance of the statements that you have made, Mr. Lewis and Senator Bond, is that the people that you represent now perceive the Federal judiciary to be changing in its ability and its capacity to provide legal redress for the poor, for the disadvantaged in the society, representing a significant change in attitude over the past 15 or 20 years. Starting with *Brown* vs. *Board of Education*, carrying it up to the present, the Federal judiciary in the 1950's and the 1960's was perceived to be a route by which the disadvantaged could find that their rights were being weighed and

redressed in an adequate fashion; but, in the last few years, there has been a sense that the Federal judiciary is closing the doors to the poor, the disadvantaged no longer being able to seek redress of wrongs in the Federal judiciary.

Is that a fair statement, a fair conclusion to reach from what you have been saying?

Mr. BOND. Yes, it is, Mr. Chairman.

Senator TUNNEY. I think that is very important for us to understand, because one of the things that I mentioned in my opening statement—and you were not here—Senator Bond, was that earlier this year there was a St. Paul conference sponsored by the Judicial Conference of the United States and the Conference of Chief Justices and the American Bar Association. The discussion dealt with the phrase "to ease the caseload in the courts," particularly the Federal courts, and there was very little discussion about access to the justice system. I said that the conference would have best been titled the causes of judicial dissatisfaction with the populous: I think that it is ironic that we should have had a conference in which the main source of inspiration was to keep the public from getting into the courts, the Federal courts in particular, rather than a discussion as to how the courts could better serve the rights and the interests of our citizenry. I say it is ironic because we hear so much and have heard so much about "power to the people" and "self-determination" and "rights of individuals to choose their own way," and we are also hearing a remarkable amount now about the responsibility of the individual, particularly as it relates to income maintenance programs; I am just wondering how you can have individual self-reliance and responsibility if access to one of the major institutions by which individuals can seek redress for perceived wrongs is denied to them.

Mr. BOND. I think, Senator, the answer is that you cannot. What you described is part, really, of a national withdrawal of the commitment of 10 years ago, and it effects, sadly, not only the Federal judiciary, but I think the people throughout the American system, in education, in business—well, throughout the whole of American society.

Senator TUNNEY. I agree with you.

I want to thank you very much, all of you, for being here. I appreciate your testimony.

Mr. BOND. Thank you.

Senator TUNNEY. Our next witness is Rhoda Karpatkin, the executive director, Consumers Union.

TESTIMONY OF RHODA KARPATKIN, EXECUTIVE DIRECTOR, CONSUMERS UNION

Ms. KARPATKIN. Mr. Chairman, on behalf of Consumers Union I want to express my appreciation for your invitation. We welcome an opportunity to voice again our concern that access to justice has been seriously narrowed by recent Supreme Court decisions affecting consumers and to focus attention on some weaknesses in the administration of justice which require prompt solution.

All of the witnesses at this hearing are likely to be speaking for the consumers of the justice system. Consumers Union will address some special concerns affecting our particular consumer constituency.

I should say, by the way, that a consumer perspective on justice is not a novel approach. Edmund Cahn declared in the 1960's that we needed to disavow the processors' point of view in dealing with the law, which he called the imperial or official point of view, and he said, "A free and open society calls on its official processors to perform their functions according to the perspective of the consumers."

Consumers need the Federal courts. It is essential that the courts be available for consumer, environmental and other public interest cases: not alone for 1-on-1 dispute resolution, but for large-scale redress. Large-scale redress does more than dispense simple justice. It presents one of the few opportunities to fashion and enforce meaningful deterrents to abuse of the consumer. A series of Supreme Court decisions have closed off major avenues for such redress, and accordingly, have vitiated the deterrent effect that effective redress mechanisms provide.

Chief Judge Irving Kaufman of the Court of Appeals for the Second Circuit recently called the social costs of insufficient access to the courts staggering, and we agree with that appraisal.

I fear there will be no enduring solution to the massive and myriad kinds of abuses visited on consumers unless we develop workable deterrents. While courts, legislators, and public interest groups must continue to focus on consumer complaint redress mechanisms, the compelling need today is to develop a system to avert such complaints. We need a guiding philosophy, a goal, of complaint avoidance: a system of laws, procedures, attitudes, and punishments dictated by an insistence that after-the-fact remedies are second best to prevention.

It is our belief that there is within reach now a panoply of proposed legislation and available legal doctrine which, if implemented, would mitigate dissatisfaction with the administration of justice, and would deter many of the wrongs which end up deluging courts and agencies with demands for redress. And, of course, to the extent they failed to deter, they would be effective in providing efficient redress to wronged consumers.

Here are some of the proposals that we put before your subcommittee this morning; I realize that many of them are either being considered by other committees of this Congress, or perhaps not being considered at all.

CLASS ACTIONS

The case for class actions hardly needs to be detailed. From the point of view of discouraging large-scale bilking of consumers, the consumer class action is one of the few remedies that holds any promise as an economic deterrent. It is, as Justice Douglas wrote in his dissent in the *Eisen* case, "one of the few legal remedies the small claimant has against those who command the status quo." And this interest in the small claimant as compared with those who command the status quo is not a new interest. My son is reading the book History Began at Sumer and in that book there is a reference to a law code that was developed 150 years before Hammauabi, and that says, "The man of one sheckel should not fall prey to the man of 60 sheckels," and I think that that philosophy should guard Congress approach to class action legislation.

From an individual consumer point of view, class actions are just in that each victim is compensated and the remedy fits the wrong; they

are efficient and provide economies of scale; they are affordable and enable small consumers to unite against large wrongdoers, and successful plaintiffs can have their legal fees awarded by the court out of an award or settlement. As an unlooked for benefit, they may engender a kind of collective bargaining for reforms between plaintiffs and defendants, the consumer having achieved for a brief moment the clout of a large group with legal representation.

It is a blow to many victimized consumers and to the public interest that several Federal court decisions have closed the door to this particular form of access and its potent deterrent value.

In *Snyder* v. *Harris*, the Supreme Court held that separate and distinct claims may not be abrogated to provide the $10,000 jurisdictional amount. In *Zahn* v. *International Paper Co.*, the Supreme Court held that multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional amount. In the *Eisen* case, the Supreme Court required that individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort, even if the cost would be prohibitive to the plaintiff.

It is clear from those decisions that effective legislation is essential to remove major barriers to class actions which implement existing consumer rights and to provide the kind of deterrence that the public interest requires. I think it is perhaps one of the national scandals of our time that no class action legislation has emanated and been passed by Congress to correct the situation.

PARENS PATRIAE LEGISLATION

Recently, the New York Times reported on a strikingly effective lobbying group, the Business Roundtable, composed of leaders of the country's giant corporations. It had singled out a few key issues, inundated Congress with top executives and big dollars, and closed in on its target with a singleminded effectiveness that let everyone know what power really means. This group, according to the Times, selected pending *parens patriae* legislation, as one of its major targets. We agree with that priority.

This legislation is intended to provide statutory authority to make antitrust law violators answerable to individual members of the consuming public, by authorizing State attorneys general to sue violators of antitrust laws in Federal courts for treble damages on behalf of citizens of their States, with the damages to be distributed by the State to the individual victims.

Consumers Union commented in favor of such legislation in 1975, when it was before the House Judiciary Committee Subcommittee on Monopoly, and we testified on behalf of S. 1284, as well. We believe such legislation is a potent deterrent against antitrust law violations, an area where consumers have been abused and economically damaged again and again.

SUITS IN THE PUBLIC INTEREST—PRIVATE ATTORNEYS GENERAL

The crusading lawyer is a reassuring if not exalted symbol in our society, and helps make the crusading client effective. Foundation funded public interest law firms added dramatically to the small

number of lawyers available to bring litigation in the public interest, to protect and enforce consumer, environmental, and other rights of the public, and to redress the unconscionable paucity of lawyers able to afford to serve the public interest. But foundation funding has always been recognized as temporary. Public interest lawyers are essential to vindicate the public interest and advance the cause of justice. They can survive and flourish only if funding is available for their litigation.

Attorney's fee awards in specific cases are an excellent method of achieving this result, and one that had raised considerable expectations on the part of the public interest bar. Unfortunately, in the *Alyeska Pipeline* case, the Supreme Court held that citizen groups acting as private attorneys general in suits vindicating public policies cannot be awarded attorneys fees in the absence of specific authorization by legislation. Until that decision, public interest firms had anticipated awards of substantial attorneys fees in litigation that was pending, and in litigation to be brought.

Indeed, in December 1975, the council for public interest law reported the results of a questionnaire to about 90 public interest law programs. Anticipated fee losses as a result of the *Alyeska* decision amounted to millions of dollars. That decision, which results in denial of access to justice for consumers, needs to be met speedily by appropriate Federal legislation.

Peter Schuck, director of CU's Washington office, in his testimony on S. 2715, which authorizes awards of attorneys' fees and costs for agencies and courts in certain actions, stated that such fee awards are an efficient and equitable means of supporting public interest litigation.

While we believe that agencies already possess the power to award such fees, we strongly support the legislation, nevertheless, with some changes, and regard it as urgently needed with respect to court awarded fees.

Next, control of corporate crime and corruption: While it is difficult to total up the cost to consumers of the millions of dollars in bribes and payoffs paid by corporate officials, and the millions lost to consumers because of price fixing and other antitrust violations, the costs are as tangible as that of the garment destroyed by a dry cleaner. This highly sophisticated form of crime is generally not visible; its perpetrators are more highly placed than the customary street mugger, and the corporate structure in the United States envelops them in a mantle of protection.

We need large scale reform in several areas. We need significant and relevant penalties imposed in an evenhanded way so that the purse snatcher and the corporate criminal are equal before the law. Even those of us who question the deterrent value of many harsh criminal penalties, take a more optimistic view of the deterrent value of such penalties for corporate crime. There are many options, and we hope legislation will evolve to control corporate corruption effectively. Indeed, Business Week magazine has called for legislation that would "subject executives to criminal penalties for 'reckless default' in their supervision of corporate actions," thus ending "the comfortable immunity of the company president who finds it convenient not to ask the sales manager about price-fixing deals or who is 'too busy' to read the engineer's report on safety problems with a new product."

We need to stop regarding the country's major corporations as

friendly neighborhood businesses. They wield the powers of quasi-governments or super-governments, not only nationally, but internationally, and require the kinds of control appropriate to such awesome power.

AGENCY FOR CONSUMER ADVOCACY

While today's vogue words may be deregulation, a clear case must continue to be made for this agency, which will redress the anticonsumer imbalance which now characterizes Government decision-making and which leaves consumers certain the Government acts in ignorance or disregard of their interests.

Effective resolution of consumer controversies: It is not only the large-scale forms of deterrent and redress that have eluded aggrieved consumers. While consumers as a class have had the courthouse doors closed to them repeatedly, the individual consumer has not fared much better. The courts, the legal profession and the legal system controlled by the profession have failed the ordinary consumer, the individual with a complaint. A major cause of consumer dissatisfaction with the administration of justice is the unavailability of effective forums for the redress of individual grievances, especially small grievances.

Efforts have been made, of course, and the number of forums are considerable, but their outreach leaves much to be desired, as does their effectiveness. The road to consumer redress, indeed, is such a labyrinth of confusion, murkiness and unaccessibility that a flourishing business has developed in guidebooks on how to complain. Unfortunately, none of the more than half-dozen now sold really points the injured consumer to surefire means of redress.

There are many steps that need to be taken. We should facilitate the creation and sound operation of a network of small claims courts. They should be prevented from being a debt collecting agency. An interstate system is needed. Section 8 of S. 2069, the Consumer Controversies Resolution Act, sets forth an excellent list of criteria for an effective small claims system, and I will not repeat them. The legislation does not, however, sufficiently protect against possible abuses of the intent of the system by corporate plaintiffs. New York's flat prohibition against corporate plaintiffs has helped keep its small claims court a consumer court. And Consumers Union, in its 1971 article, suggested restrictions on the number of times a small claims court could be used by a particular plaintiff.

We should explore forums for resolution and adjudication of complaints outside our traditional court system. The Consumer Controversies Resolution Act is one sound approach, but it must be funded sufficiently to make it meaningful. Systems for arbitration should be considered, although we must be aware of the damages that can be brought by anticonsumer precommitment clauses, which are now cropping up. If there is a movement in favor of considerable arbitration effort, we have to be careful to evaluate it as we go along to make sure that it is effective and fulfills its promise.

Study, experimentation, and the support of the organized bar are all surely needed to develop and try a variety of ways to make the consumer whole.

DEJUDICIALIZE

Some court or contested proceedings are anachronistic. The concept of an inexorable relationship between fault and remedy has already

been questioned, and the concept of no-fault is a promising one. We need new approaches. Judge Kaufman discussed a kind of no-fault approach to recoveries for consumer complaints: a government agency would reimburse defrauded consumers immediately and then would proceed against the defendants.

Some matters can be shifted from courts to administrative agencies. Simple probates and adoptions, and no-fault divorces, for example, should be considered for processing as clerical, rather than legal services.

LEGAL SERVICES FOR ALL CONSUMERS WHO NEED THEM

An American Bar Association committee published in 1974 a 228-page summary entitled, "The Legal Needs of the Public." It makes a persuasive case that many who have needed legal services have failed to consult lawyers. The reasons are numerous. Some consumers cannot afford legal services; others do not know they need lawyers, or cannot find lawyers they can afford. We need to make justice more accessible by making legal services more available.

In the private sector, prepaid legal services, group legal services, and legal clinics must be encouraged. In the public sector, legal services must be made available to those who cannot otherwise afford them. The U.S. Riot Commission reported that one of the most intense grievances underlying the ghetto riots of 1967 was the unavailability of legal services to ghetto residents both for litigation and for other purposes. We should not need another series of riots to prod the creation and maintenance of necessary legal services for the poor.

The cost of legal services must be reduced. Economies possible by use of paralegals, by economies of scale, by modern technologies or pooled resources, must be sought and implemented. Consumers Union has urged that an end to barriers to truthful advertising by lawyers would stimulate price competition and reduce the cost of legal services accordingly.

Consumers of legal services need to be made more aware of what their legal rights are and what lawyers can do for them. Bar association educational programs, to the extent that they exist, have generally failed to do this. Ending restrictions on truthful lawyer advertising is one way to disseminate information, and is a necessity. Justice Department speakers have characterized these restrictions as violations of the antitrust laws. Directories containing important information about lawyers and their fees are also necessary. Consumers Union is litigating restrictions on directories and lawyer advertising in two forums.

IMPROVE THE ADMINISTRATION OF JUSTICE IN ALL COURTS AT ALL LEVELS

We do not believe the administration of justice is improved by closing the door in the face of litigants who have claims for which the Constitution or statutes mandate redress. New methods, efficient

systems and modern technologies can do for the courts what many consumers expect they will do for law firms: make them more efficient and less expensive.

DELAWYERING

We need to reduce lay dependence on lawyers. While some tasks are so complex that they must be performed by lawyers, others can be simplified. A new system of title registration, for example, as discussed in the August 1975 issue of Consumer Reports, would eliminate much of the need for legal services in land transfer.

We need to take a fresh look at the bar's customary disapproval of do-it-yourself lawyering, and determine if some areas of the law lend themselves to intelligent self-help by lay people.

I want to compliment this subcommittee for providing an opportunity to air these important issues.

This country needs to find ways to move closer to the day that Roscoe Pound sought in the speech which gave this hearing its title—

A near future when our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all.

Senator TUNNEY. Thank you very much, Ms. Karpatkin.

I think that your statement is excellent. Obviously a great deal of thought went into it. It makes a real contribution to our hearing. Perhaps one of the reasons I feel it is so good is because I agree with almost all of it.

I just cannot help but feel that in the last few years, as a result of our Supreme Court decisions, there has been a great restriction on the ability of consumers to seek redress of grievances in the Federal judiciary; I think that the *Alyeska* case was particularly pernicious, from my viewpoint, in this regard, and I am hoping that we are going to be able to get specific legislation through the Congress which will allow the awarding of attorney's fees in these public interest cases not only environmental cases, but civil rights cases as well. I have proposed legislation, as you may know, to achieve that, and I hope we can get it through the Judiciary Committee soon.

There are many other areas as well, and now that the Supreme Court has said that the Congress is going to have to act affirmatively in the award of attorney's fees, judges no longer having discretion, it is important that we develop a comprehensive approach in this regard. I will be working with the staff of this subcommittee and persons such as yourself not only on specific one-shot bills to redress a particular grievance—such as in civil rights cases or proceedings before administrative panels or environmental cases—but on a more general approach whereby we could give to the courts guidelines for the awarding of attorney's fees.

I want to thank you for being here. I appreciate it very much. We look forward to working with you.

Ms. KARPATKIN. Thank you, Senator.

[The prepared statement of Ms. Karpatkin follows:]

PREPARED STATEMENT OF RHODA H. KARPATKIN, EXECUTIVE DIRECTOR, CONSUMERS UNION OF UNITED STATES, INC.

Mr. Chairman and members of this distinguished Subcommittee: On behalf of Consumers Union,[1] I wish to express my appreciation of your invitation to express our views on *Causes of Popular Dissatisfaction With the Administration of Justice.* We welcome an opportunity to voice again our concern that access to justice has been seriously narrowed by recent Supreme Court decisions affecting consumers, and to focus attention on some weaknesses in the administration of justice which require prompt solution.

In our articles in *Consumer Reports,* in recent years, we have devoted considerable space to a variety of consumer services. It is only a small leap, therefore, to take a consumerist look at a system created to deliver justice to its consumers. Such a perspective does not tread new ground. Indeed, Edmund Cahn, writing in 1963, called attention to a new perspective on the law caused by the democratic revolution. Replacing the processor's point of view (the "imperial or official") was the consumer perspective. "A free and open society calls on its official processors to perform their functions according to the perspective of the consumers," he wrote.

All of the witnesses at this hearing are likely to be speaking for the consumers of the justice system. Consumers Union will address some special concerns affecting our consumer constitutency.

Consumers need the federal courts. It is essential that the courts be available for consumer, environmental and other public interest cases: not alone for one-on-one dispute resolution, but for large-scale redress. Large-scale redress does more than dispense simple justice. It presents one of the few opportunities to fashion and enforce meaningful deterrents to abuse of the consumer. The series of Supreme Court decisions discussed below have closed off major avenues for such redress and, accordingly, vitiated the deterrent effect that effective redress mechanisms provide.[2]

The seriousness of this was recently underscored by Chief Judge Irving Kaufman of the Court of Appeals for the Second Circuit. Speaking at the New York University Law School Bicentennial Conference on April 29, he noted: "Although we tend to overlook the *social* costs of insufficient access to the courts and suboptimal resolution of disputes, they are *real* costs nonetheless, and they are of staggering magnitude. These costs must not be ignored simply because they do not appear in official governmental budget documents or because they tend to be borne in silence."

I fear there will be no enduring solution to the massive and myriad kinds of abuses visited on consumers unless we develop workable deterrents. While courts, legislators and public interest groups must continue to focus on consumer complaint redress mechanisms, the compelling need today is to develop a system to avert such complaints. We need a guiding philosophy, a goal, of complaint *avoidance:* a system of laws, procedures, attitudes and punishments dictated by an insistence that after-the-fact remedies are second best to prevention. As with smallpox, consumers need to be immunized, in preference to being treated.

It is our belief that there is within reach now a panoply of proposed legislation and available legal doctrine which, if implemented, would mitigate dissatisfaction with the administration of justice, and would deter many of the wrongs which end up deluging courts and agencies with demands for redress. And, of course, to the extent they failed to deter, they would be effective in providing efficient redress to wronged consumers.

Here are some proposals CU urges as part of a system to protect the consumer with a mantle of deterrent and remedy:

CLASS ACTIONS

The case for class actions hardly needs to be detailed. From the point of view of discouraging large-scale bilking of consumers, the consumer class action is one of the few remedies that holds any promise as an economic deterrent. It is, as

[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education, and counsel about consumer goods and services and the management of the family income. Consumers Union's income is derived solely from the sale of *Consumer Reports* (magazine and TV) and other publications. Expenses of occasional public service efforts may be met, in part, by nonrestrictive noncommercial grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports,* with its almost 2 million circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[2] Cases not referred to in the text are included in the Appendix to this testimony.

Justice Douglas wrote in his dissent in *Eisen* v. *Carlisle and Jacquelin*, "one of the few legal remedies the small claimant has against those who command the status quo." He urged its strengthening "with the view of creating a system of law that dispenses justice to the lowly as well as those liberally endowed with power and wealth."

From an individual consumer point of view, class actions are just, in that each victime is compensated, and the remedy fits the wrong; they are efficient and provide economies of scale. They are affordable, and enable small consumers to unite to act against large wrongdoers; successful plaintiffs can have their legal fees awarded by the court out of an award or settlement. As an unlooked for benefit, they may engender a kind of collective bargaining for reforms between plaintiffs and defendants, the consumer having achieved, for a brief moment, the clout of a large group with legal representation.

The recently announced proposed settlement of a portion of a $5.5-million class action suit against a group of New York department stores is an example. The suit followed Justice Department price-fixing charges against the group, to which they pleaded no contest, and paid fines. The sum of $1.2-million will be divided among certain customers; the class numbers 550,000 members.

It is a blow to many victimized consumers and to the public interest that several federal court decisions have closed the door to this particular form of access and its potent deterrent value.

In *Snyder* v. *Harris*, 394 U.S. 332, 89 S. Ct. 1053 (1969), a class action by a customer on behalf of herself and others similarly situated against a gas company to recover overpayments, the Supreme Court held that separate and distinct claims may not be aggregated to provide the $10,000 jurisdictional amount, i.e., where each plaintiff has a claim under $10,000 but all claims added together total more than $10,000.

In *Zahn* v. *International Paper Co.*, 414 U.S., 94 S.Ct. 505 (1973), four property owners sued a corporation for damages for alleged pollution of lake and damage to property values. Only the named plaintiff met the $10,000 jurisdictional amount. The Supreme Court held that multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional amount and that any plaintiff who does not must be dismissed from the action. This decision not only forbids aggregation, as in the *Snyder* case, but requires dismissal of those whose claims are below the jurisdictional amount, even though other litigants assert claims sufficient to invoke federal jurisdiction.

In *Eisen* v. *Carlisle and Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140 (1974), a class action suit was brought by odd-lot traders against brokerage firms, alleging violations of antitrust and securities laws. The Supreme Court held that in a class action maintained in part on the basis that questions of law or fact common to members of the class predominate over questions affecting only individual members, individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort, even if the cost is prohibitive, to give class members an opportunity to request exclusion from the action or to participate in its management.

It is clear from those decisions, that effective legislation is essential to remove major barriers to class actions which implement existing consumer rights, and to provide the kind of deterrents the public interest requires.

PARENS PATRIAE LEGISLATION

Recently, *The New York Times* reported on a strikingly effective lobbying group, the Business Roundtable, composed of leaders of the country's giant corporations. [The *Times* reported 158 corporate members; 63 of the nation's 100 top industrial companies.] It had constructed a lobby which singled out a few key issues, inundated Congress with top executives and big dollars, and closed in on its target with a singleminded effectiveness that let everyone know what power really means. This group, according to the *Times*, selected pending parens patriae legislation as one of its major targets.

I would suppose from its choice of priorities that the Business Roundtable shares our view of the importance of this legislation, which is intended to provide statutory authority to make antitrust law violators answerable to individual members of the consuming public, by authorizing State Attorneys General to sue violators of antitrust laws in federal courts for treble damages, on behalf of citizens of their states, with the damages to be distributed by the state to the individual victims.

Consumers Union commented in favor of parens patriae legislation when it was before the House Judiciary Committee's Subcommittee on Monopoly, and testified in behalf of S. 1284 in 1975. We believe such legislation is a potent deterrent against antitrust law violations—an area where consumers have been abused and economically damaged again and again.

SUITS IN THE PUBLIC INTEREST (PRIVATE ATTORNEYS GENERAL)

The crusading lawyer is a reassuring if not exalted symbol in our society—and helps make the crusading client effective. Foundation funded public interest law firms added dramatically to the small number of lawyers available to bring litigation in the public interest, to protect and enforce consumer, environmental and rights of the public, and to redress the unconscionable paucity of lawyers able to afford to serve the public interest. But foundation funding has always been recognized as temporary. Public interest lawyers are essential to vindicate the public interest and advance the cause of justice, and can survive and flourish only if funding is available for their litigation.

Attorneys' fee awards in specific cases are an excellent method of achieving this result. The Director of Consumers Union's Washington Office, Peter Schuck, testifying on S. 2715 (which would authorize the award of attorneys' fees and costs by agencies and courts in certain cases), described in detail the nature of the litigation and the funding problems of public interest law firms. He has added our testimony to the strong case made in previous testimony before this Subcommittee, for the need to remedy a situation where the resources are both insufficient and insecure:

"The greater availability of attorneys' fee awards, however, is a singularly efficient and equitable means for accomplishing this objective. It is *efficient* in that it rewards a "public interest law firm" directly for its role in a particular situation deemed worthy of support, in contrast to a system of governmental support for the organization in general, which would be an inefficient approach. The fee award is "targeted" in a way that ensures that incentives will not be distorted but will be properly discriminating.

"One need only consider the nature of 'public interest' litigation and intervention in agency proceedings to appreciate that such an approach is equitable as well. Typically, such litigation is quite expensive, perhpas even more so than civil litigation generally, which itself is far beyond the means of most individuals and organizations."

Indeed, fee awards have already been introduced at the Administrative level, with the FTC's reimbursement of the cost of citizen participation in rulemaking proceedings.

Unfortunately, in the case of *Alyeska Pipeline Co.* v. *Wilderness Society,* 95 S.Ct. 1612 (1975), the Supreme Court held that citizen groups acting as "private attorneys general" in suits vindicating public policies cannot be awarded attorneys fees, in the absence of specific authorizing legislation. Until that decision, public interest firms had anticipated awards of substantial attorneys fees in pending litigation.

Those fees were regarded by such law firms as a prerequisite to maintaining environmental, consumer, civil rights and other public interest litigation. In December, 1975, the Council for Public Interest Law reported the results of a questionnaire to about 90 public interest law programs, about half of whom were affected by the decision; anticipated fee losses amounted to millions of dollars. That decision, which results in a denial of access to justice for consumers, needs to be met speedily by appropriate federal legislation.

Mr. Schuck, in his testimony on S. 2715, stated our belief that agencies already possess power to award such fees. We strongly support the legislation nevertheless, and regard it as urgently needed with respect to court awarded fees. (Mr. Schuck's testimony outlines several changes we recommend, and is available if you wish it.)

CONTROL OF CORPORATE CRIME AND CORRUPTION

While it is difficult to total up the cost to consumers of the millions of dollars in bribes and payoffs paid by corporate officials, and the millions lost to consumers because of price-fixing and other antitrust violations, the costs are as tangible as that of the garment destroyed by a dry cleaner. This highly sophisticated form of crime is generally not visible, its perpetrators are more highly placed than the customary street mugger, and the corporate structure in the United States envelops them in a mantle of protection.

But the need for deterrent and remedy has been placed before us in a dramatic and insistent way by newspaper reports of recent months. Whether we treat this narrowly as an economic crime only (*The Wall Street Journal* has characterized bribery as "an assault on the price mechanism that produces an uneconomic allocation of resources"), or recognize it for the epidemic of immorality it has turned out to be, we need large-scale reforms in several areas:

We need significant and relevant penalties imposed in an evenhanded way. Even those of us who question the deterrent value of many harsh criminal penalties, take a more optimistic view of the deterrent value of such penalties for corporate crime. There are many options, and we hope legislation will evolve to control corporate corruption effectively. Ralph Nader has urged a new division of corporate crime, in the Department of Justice, to deter or ferret out the elegant muggers from America's most distinguished business leaders. Indeed, *Business Week* magazine has called for legislation that would "subject executives to criminal penalties for 'reckless default' in their supervision of corporate actions," thus ending "the comfortable immunity of the company president who finds it convenient not to ask the sales manager about price-fixing deals or who is 'too busy' to read the engineer's report on safety problems with a new product."

We need to stop regarding the country's major corporations as friendly neighborhood businesses. They wield the powers of quasi-governments or super-governments, not only nationally, but internationally, and require the kinds of control appropriate to such awesome power. Ralph Nader has made a case for federal corporate charters that merits serious consideration.

We surely need more public members on the boards of major corporations, diligently executing their duties and aware of their accountability to the public. Suits by the Center for Law in the Public Interest, in California, achieved this result with respect to two corporations, in recently concluded public interest litigation.

AGENCY FOR CONSUMER ADVOCACY

While today's vogue word may be deregulation, a clear case must continue to be made for an agency to redress the anti-consumer imbalance which now characterizes goverment decision-making, and which leaves consumers certain the government acts in ignorance or disregard of their interests. The Agency for Consumer Advocacy will provide to consumers representation and a voice in the decision-making process, and at the crucial point before the decision is made.

EFFECTIVE RESOLUTION OF CONSUMER CONTROVERSIES

It is not only the large-scale forms of deterrent and redress that have eluded aggrieved consumers. While consumers as a class have had the courthouse doors closed to them repeatedly, the individual consumer has not fared must better. The courts, the legal profession and the legal system it controls, have failed the ordinary consumer—the individual with a complaint. A major cause of consumer dissatisfaction with the administration of justice is the unavailability of effective forums for the redress of individual grievances, especially small grievances.

Efforts have been made, of course, and the number of forums are considerible: small claim courts, state, city and county consumer affairs officers, attorneys-generals frauds divisions, business review boards, radio, newspaper and television action lines; voluntary consumer complaint centers, Congressional offices, union complaint handling systems, ombudsmen, company hot-lines, and so on. But studies show that too many consumers are unaware of what is available. The proliferation of institutions processing or hearing complaints may be large, but their outreach leaves much to be desired, as does their effectiveness.

Indeed, the road to consumer redress is such a labyrnth of confusion, murkiness and unaccessibility that a flourishing business has developed in guidebooks on how to complain. Unfortunately none of the more than half-dozen now sold really points the injured consumer to sure-fire redress.

There are many steps that need to be taken. Not all, of course, fall within the ambit of Congress.

FACILITATE THE CREATION AND SOUND OPERATION OF A NETWORK OF SMALL CLAIMS COURTS

Prevent them from being debt-collecting agencies. An interstate system is needed. Section 8 of S. 2069, the Consumer Controversies Resolution Act, sets forth an excellent list of criteria for an effective small claims system, and I will

not repeat them. The legislation does not, however, sufficiently protect against possible abuses of the intent of the system by corporate defendants. New York's flat prohibition against corporate plaintiffs has helped keep its Small Claims Court a consumer court. And Consumers Union, in its 1971 article, suggested restrictions on the number of times a small claims court could be used by plaintiffs.

EXPLORE FORUMS FOR RESOLUTION AND ADJUDICATION OF COMPLAINTS OUTSIDE OUR TRADITIONAL COURT SYSTEM

The Consumer Controversies Resolution Act is one approach, but it must be funded sufficiently to make it meaningful. Systems for arbitration should be considered, although we must be aware of the damages of the anti-consumer pre-commitment clauses now cropping up. The Chief Justice of the United States, at the Pound Conference, urged new tribunals to adjudicate customary consumer complaints, and the Association of the Bar of the City of New York's Special Committee on Consumer Affairs offered a detailed proposal in 1972 for a new tribunal for the resolution of consumer complaints. (Record of the Association of the Bar of the City of New York 419). Study, experimentation and the support of the organized bar are all surely needed to develop and try a variety of ways to make whole the consumer with a valid complaint.

DEJUDICIALIZE

Some court or contested proceedings are anachronistic. The concept of an inexorable relationship between fault and remedy has already been questioned, and the concept of no-fault is a promising one. The New York Small Claims Court uses volunteer lawyers for voluntary arbitrations. Judge Kaufman discussed a kind of no-fault approach to recoveries for consumer complaints: a government agency would reimburse defrauded consumers immediately, and would then proceed against the merchant.

Some matters can be shifted from courts to administrative agencies: simple probates and adoptions, and no-fault divorces, for example, should be considered for processing as clerical, rather than legal, services.

IMPROVE THE ADMINISTRATION OF JUSTICE IN ALL COURTS AT ALL LEVELS

Where that means more judges, add them. It surely means striving for new modes and efficiencies in the way our courts are administered. We do not believe the administration of justice is improved by closing the door in the face of litigants who have claims for which the Constitution or statutes mandate redress. New methods, efficient systems and modern technologies can do for the courts what many consumers expect they will do for law firms: make them more efficient and less expensive. Judge Irving Kaufman advanced some thoughts and proposals on this at his New York University Bicentennial Conference speech. More study is needed on how to make our courts more efficient and responsive.

LEGAL SERVICES FOR ALL CONSUMERS WHO NEED THEM

The American Bar Association's Special Committee to Survey Legal Needs published in 1974 a 228-page summary entitled, "The Legal Needs of the Public." It makes a persuasive case that many who have needed legal services have failed to consult lawyers. The reasons are numerous. Some consumers can't afford legal services. Others don't know they need lawyers, or can't find lawyers they can afford. We need to make justice more accessible by making legal services more available:

Develop and nurture programs which bring lawyers to people who need them *when* they need them, and at fees that are reasonable and affordable. In the private sector, prepaid legal services, group legal services, and legal clinics must be encouraged. In the public sector, legal services must be made available to those who can't otherwise afford them. Following the 1968 ghetto riots, the U.S. Riot Commission reported that one of the most intense grievances underlying the riots of 1967 was the unavailability of legal services for ghetto residents, both for litigation and for other purposes. We should not need another series of riots to prod the creation and maintenance of necessary legal services for the poor.

The cost of legal services must be reduced. Economies possible by use of paralegals, by economies of scale, by modern technologies or pooled resources, must be sought and implemented. Consumers Union has urged that an end to barriers

to truthful advertising would stimulate price competition, and reduce the cost of legal services accordingly.

Consumers of legal services need to be made more aware of what their legal rights are and what lawyers can do for them. Bar association educational programs, to the extent they exist, have generally failed to do this. Ending restrictions on truthful lawyer advertising is one way to help disseminate information. Directories containing important information about lawyers and their fees are also necessary. Consumers Union has urged that such restrictions on directories and advertising should be lifted, and is litigating that issue in two forums.

DELAWYERING

We need to reduce lay reliance on lawyers. While some tasks are so complex that they *must* be performed by lawyers, some can be simplified. A new system of title registration, for example, as discussed in the August, 1975 issue of *Consumer Reports*, would eliminate much of the need for legal services in land transfer. And the Chief Justice too, has called for simplification in this area.

We need to take a fresh look at the bar's customary disapproval of do-it-yourself lawyering, and determine if some areas of the law lend themselves to intelligent self-help by lay people. Statutory standardized forms for certain common transactions, in clear language, should be considered.

I want to compliment this Subcommittee for providing an opportunity to air these important issues. While we have not covered the entire field with this listing, and some of our proposals may fall outside your scope, we have, I hope, suggested ways to move closer to the day Roscoe Pound sought in the article which gave this hearing its title: "a near future when our courts will be swift and certain agents of justice, whose decision will be acquiesced in and respected by all."

[Appendix]

Some Recent Cases Affecting Consumers, Limiting Access to the Courts

Schlesinger v. *Reservists Committee to Stop the War*, 418 U.S. 94 S. Ct. 2925 (1974)

Citizens and an association of present and former members of the Armed Forces Reserve brought a class action on behalf of all citizens and taxpayers alleging that simultaneous membership in Congress and the Armed Forces Reserve violated the Incompatability Act.

The Supreme Court held there was no standing to sue as citizens where the claim implicates only the "generalized interest of all citizens in constitutional governance and is thus merely an abstract injury." It held there was no standing to sue as taxpayers since they failed to establish a "logical nexus" between taxpayer status and claim.

Warth v. *Seldin*, U.S., 95 S. Ct. 2197 (1975)

Rochester community group, Rochester taxpayers, Rochester area low and moderate income persons, Rochester home builders, and not-for-profit Housing Council in Monroe County were all held to have no standing to challenge zoning ordinances of Rochester suburb which effectively excluded all people of low and moderate incomes from living in the town. The Court held that petitioners must show they have *personally* been injured, and that absent the allegedly unconstitutional actions of respondents, there is a substantial probability that they could purchase or lease in the suburb.

Hawaii v. *Standard Oil Co. of California*, 405 U.S. 251, 92 S. Ct. 885 (1972)

State of Hawaii sued under the Clayton Act as *parens patriae* for injunctive and monetary relief against overcharges paid by its citizens to Standard Oil.

The Court held that while state may sue as *parens patriae* to prevent or repair harm to its "quasi-sovereign" interests under a common law right of action, Section 4 of the Clayton Act does not authorize a state to sue for damages for injury to its general economy caused by antitrust violations. (Injury to general economy is *not* an injury to state's "business or property" within the terms of Section 4.)

Cort v. *Ash*, U.S. 95, S. Ct. 2080 (1975)

Derivative action by stockholders against corporation for illegal corporate campaign contributions. The Supreme Court held that Federal Elections Campaign Act did not create a private right of action for such suits.

Blue Chip Stamps v. *Manor Drug Store*, 421 U.S. 723, 95 S. Ct. 1917 (1975)

An antitrust consent decree required Blue Chip to offer common stock to retailers. Manor Drug alleged that it was dissuaded from purchasing stock by an overly pessimistic appraisal of the new business. Plaintiff sued for damages under SEC rule 10 b-5. The Court held that plaintiff lacked standing to sue, because it was neither a purchaser nor seller as defined in the Act. Mr. Justice Blackmun, dissenting, stated :"In doing so, the Court exhibits a preternatural solicitousness for corporate well being and a seeming callousness toward the investing public quite out of keeping, it seems to me, with our own traditions and the intent of the securities law." (421 U.S. 723, 750)

Senator TUNNEY. Our next witness is Thomas F. Field, executive director, Tax Analysts and Advocates, and James Dale Davidson, executive director, National Taxpayers Union.

I am going to ask you, if you could, to either read your statements quickly or abbreviate them a bit, because we have got time problems.

Thank you very much.

TESTIMONY OF THOMAS F. FIELD, EXECUTIVE DIRECTOR, TAX ANALYSTS AND ADVOCATES

Mr. FIELD. Mr. Chairman, thank you very much for this opportunity to address the subcommittee. I have only two brief points.

First, it is my strong view that Internal Revenue Service administrative decisions should be subject to judicial review in all cases, not just in those cases in which revenue is raised as a result of the decision.

My second point is that the Internal Revenue Service should not be allowed to push ordinary citizens around, without hope of judicial review, just because they happen to owe no tax.

I would like to discuss each of those two points, Mr. Chairman, very briefly.

The Internal Revenue Service is thought of as an agency that raises money. But, in addition, the Internal Revenue Service is also able to give money away by administrative determinations. I have listed in my statement several instances in which the IRS has unilaterally, without public hearing, given away hundreds of millions of dollars to special interest claimants through IRS rulings. The most prominent example, and one which we are currently seeking to litigate in court, is the set of foreign tax credit rulings for oil firms which go back to the early 1950's. Those rulings, I think, are quite clearly illegal. They were illegal in their inception. And the facts as to the way in which foreign oil tax credits are now generated make it clear that they are still illegal. Nevertheless, the courts have held that no one has a right to challenge those Internal Revenue Service rulings. Now that judicial ruling is on appeal in a case in which my organization, Tax Analysts and Advocates, and I personally, are plaintiffs. But to this point the court's decision is that when the IRS gives away money to special interest claimants that give away is beyond judicial review.

In concluding on this point, I would like to observe that I can think of nothing that is more calculated to inspire cynicism about the role of our courts in our society than the spectacle of an Internal Revenue Service which is apparently beyond judicial control when it issues patently illegal rulings that grant enormous tax favors to powerful special interests.

Senator TUNNEY. May I just stop you there?

It would require a very simple amendment of the Internal Revenue Code to correct that situation; would it not?

Mr. FIELD. The problem that blocks taxpayers from challenging IRS administrative action when the result of that action is to lose revenue is the doctrine of standing, which is, of course, a doctrine of judicial creation. It seems to me the problem does not in the first instance have its root in the Internal Revenue Code.

Senator TUNNEY. Well, then it would be a very simple amendment to the basic law, the Rules of Civil Procedure, to have standing given to an individual taxpayer.

Mr. FIELD. It would, Senator. It seems to me that it is the Judicial Code on which we want to focus our attention. I might add that I think that a statutory cure for the problem of taxpayer standing is very much needed. The Supreme Court has vacillated so frequently on this issue of standing in the last decade, has created such a hash with its conflicting decisions, that it seems to me that it is time for Congress to step in and bring clarity to this very important area of the law.

Now, with regard to my second point. I mentioned that I do not think the IRS should have the right to push ordinary citizens around, without hope of judicial redress, just because they do not happen to owe any tax. You might say, "Well, how can that happen?"

Let me give you by way of answer three specific instances. First of all, in the early years of this decade the Internal Revenue Service began to issue what were known as "private academy rulings"; they basically said that you may organize a segregated private academy and enjoy tax-exempt status even though you exclude blacks or other minorities. That set of rulings was successfully challenged in court in a case known as *McGlotten* v. *Conally*, in which black plaintiffs challenged the right of the IRS to issue those rulings. I think the significance of that decision is that there is nothing inherently non-justiciable about an IRS ruling.

The second instance in which the rights of non-payers have been affected by IRS action is now before the Supreme Court in a case called *Eastern Kentucky Welfare Rights Organization* v. *Simon*. EKWRO is the acronym of the organization. In the EKWRO case, welfare recipients in eastern Kentucky are challenging the right of the Internal Revenue Service to grant charitable status to a hospital which refuses to treat poor patients. The question on which the government has asked Supreme Court review is the question whether the individuals in a community affected by an IRS ruling granting charitable status to a hospital, even though the hospital announces a decision not to allow poor people to be treated there, can protest that ruling in court. I think it obvious that in such a situation they should be allowed to protest.

A third situation, and one which we have unsuccessfully litigated in the courts, is the censorship of our own weekly tax news magazine, which we publish for the press. We are a tax exempt organization, and as a consequence, we owe no taxes to the Federal Government of any sort. Nevertheless, as a precondition to maintaining tax exempt status, we are required each week to remove from our publication anything that could be construed to be a comment on legislation. I personally have wielded the blue pencil. Sometimes, too, I have published things

that I did not particularly want to publish, just so that we would have some protective coloration in the event of an IRS audit.

The problems here are twofold: First, the IRS has never spelled out the rules in this area. Former chief counsel of the IRS, Mitchell Rogovin, in an affidavit that we will soon be filing in court, has testified that the reason the IRS has never spelled out the rules is that they like to keep them vague. There is a doctrine, a constitutional doctrine under the first amendment, known as "void for vagueness", and the statute that we sought to challenge 2 years ago is, in our view, precisely that, void for vagueness. And yet that statute requires us to censor a publication which is a major organ for informing the press about Federal tax decisions.

The courts have held that unless we choose first to violate the law, incur IRS audit and penalties, and undergo automatic bankruptcy, because all of our foundation support at that point would be reclaimed under the Tax Reform Act of 1969, unless we did those things, unless we underwent the dangers of IRS audit and bankruptcy, we could not get into court to protest the censorship of our publication. As a result, we have continued, week by week, to censor a publication designed to inform the press about Federal tax issues.

Mr. Chairman, I think it is outrageous that an organization such as ours, which seeks to monitor the actions of the Internal Revenue Service, should find itself subject to censorship by the very Federal agency which it seeks to monitor and then, on top of that, should find itself thrown out of court and in effect deprived of any enforceable first amendment rights.

Thank you.

Senator TUNNEY. Thank you. I make a personal note on your testimony that what you have said raises the temperature of my blood. I would like very much to work with you to see if we can develop some legislation that could remedy the present condition.

I think that everything that you pointed out in your testimony is just another indication of why it is that many people have lost faith in the institutions which traditionally have been thought of as having been created for the benefit of the taxpayer—the citizen—and yet now to a considerable extent are considered amongst hostile powers that are unaccountable and certainly not responsive to individual needs. It has produced the kind of political cynicism and apathy that many of us can sense as political figures out amongst our constituents.

Mr. FIELD. I listened to some of the witnesses earlier this morning, Mr. Chairman, who voiced similar sentiments, and I must say that I, too, am beginning to be concerned about the willingness of our courts to do justice. It seems to me that, all too frequently, the key decisions today turn on technicalities. They may be technicalities relating to the Internal Revenue Code, to the Judicial Code, to the Doctrine of Standing, or to the question of whether remedies have been exhausted in State courts. But ordinary citizens, even though they are unskilled in the law, recognize a technicality when they see one; they recognize a denial of justice when they see one, and that is why I think we have the cynicism that is growing, and that I sense, and you sense.

Senator TUNNEY. Thank you very much.

[The prepared statement of Thomas F. Field follows:]

PREPARED STATEMENT BY THOMAS F. FIELD, EXECUTIVE DIRECTOR, TAX ANALYSTS AND ADVOCATES

Mr. Chairman, and members of the Subcommittee:

I want to thank you for your invitation to testify regarding the causes of popular dissatisfaction with the administration of justice. That is a broad subject, and I want to confine myself today to one aspect: the need for greater access to the courts by those seeking judicial review of Internal Revenue Service actions.

In this connection, I wish to make only two brief, but highly important points: First—All IRS administrative decisions should be subject to judicial review, not just those that raise revenue. Second—No charitable or educational group should be forced to violate the law before being allowed to go to court to vindicate Constitutional rights that have been violated by IRS action.

INTRODUCTION

Bureaucrats, whether in the Internal Revenue Service or elsewhere, can make honest mistakes. Moreover, they can also yield to political and other pressures to engage in lawless or illegal administrative actions. That is why, more than a generation ago, Congress provided broad access to the courts for those wishing to obtain judicial review of agency action.

But, in the case of the Internal Revenue Service, judicial review by some of the most important agency actions is claimed by the IRS to be barred by statute, judicial precedent, or a combination of both. And, to date, those IRS claims have been generally sustained by the courts.

The IRS actions which are said to be beyond the scrutiny of the courts fall into two categories: tax giveaways, and actions which injure the rights of nontaxpayers.

TAX GIVEAWAYS

The IRS, by administrative regulation and private ruling, can affect the tax liabilities of individuals and firms. If the administrative action results in greater tax payments, that action is subject to judicial review in three forums: the Tax Court, the Court of Claims, and the district courts.

But if the administrative determination—no matter how illegal—results in a *loss* of revenue, the IRS claims that its administrative actions are totally beyond judicial review. In short, the IRS cannot *raise* revenue without running the gamut of judicial review, but it claims that it can *give away* revenue to special interest claimants without any risk that its actions will be reviewed by the courts.

Thus, for example, there has never been judicial review of the following IRS administrative rulings, each of which was highly questionable, and each of which was the result of secret negotiations between the IRS and attorneys for the special interests whose taxes were lowered as a result of those rulings:

(*a*) The ruling that convicted antitrust violators could deduct their treble damage payments. (Cost to the public: in excess of $400 million through 1969, when Congress repealed this ruling).

(*b*) The rulings that oil, gas, and mineral producers could minimize their tax payments through questionable "production payment" transactions. (Cost to the public: $200 million per year through 1969, when Congress repealed this ruling as well).

(*c*) The ruling that royalty-type taxes paid to OPEC countries are creditable against U.S. tax, rather than deductible. (Cost to the public: more than $1 billion annually).

The third of these rulings, which is still in effect, is worthy of special mention. Thanks to the hearings of the Senate Subcommittee on Multinational Corporations, the secrecy which formerly surrounded the origin of the OPEC royalty tax rulings has been lifted to some degree. It is now clear that those rulings were illegal in their origin, having been forced on the Internal Revenue Service at State Department insistence as a means of granting foreign aid to Arab states at a time when it was clear that Congressional sentiment would have blocked such aid.

It is equally clear that those rulings continue to violate the law. The OPEC governments in recent years have abandoned any pretense that these taxes are computed by reference to either gross or net income. Instead, they are now levied as straight per-barrel excises. Excise taxes are deductible, not creditable, against U.S. income tax.

Hence, the existing system of tax credits for major oil producers constitutes an illegal system of tax subsidies, totally unauthorized by Congress—indeed, adopted

as a means of circumventing Congress. Ordinary taxpayers are paying over $1 billion in extra taxes each year as a result of these tax credit rulings. Yet the courts have ruled that no one has judicial "standing" to seek review of these patently illegal determinations.

In my view, this is an outrageous situation. If an IRS ruling costs an individual taxpayer a single penny, he can obtain judicial review of that ruling in any one of three separate courts. But if an obviously illegal set of IRS rulings costs ordinary taxpayer a single penny, he can obtain judicial review of that ruling in any one taxpayers more than $1 billion annually, no one has standing to obtain judicial review of those rulings.[1]

I can think of nothing more calculated to inspire cynicism about the role of the courts in our society than the spectacle of an Internal Revenue Service which is apparently beyond judicial control when it issues illegal rulings that grant enormous tax favors to powerful special interests. And this cynicism is increased when one notes how swift the courts are to review IRS action when it affects the pocketbooks of those same interests.

PROTECTION FOR THE RIGHTS OF NONTAXPAYERS

Most IRS actions are focused on the collection of tax revenues. But IRS administrative action can also affect nontaxpayers. And, in such instances, the IRS has been largely successful in exempting itself from judicial review.

For example, one of the basic goals of our organization is to assist the press in analyzing tax issues. For this purpose, we publish a weekly tax newsmagazine, *Tax Notes*. We are forced to censor this magazine each week, in an attempt to comply with a set of exceedingly vague IRS rules governing the extent to which we may, or may not, comment on legislation.

Let me say, in passing, that I believe it is clear that the IRS rules in question violate the First and Fifth Amendments to the Constitution. Neither these nor any similar rules could survive even the most cursory judicial scrutiny if they were presented to the courts on their merits.

But there appears to be no way in which these issues can be presented to the courts. We brought suit more than three years ago to test these IRS rules in light of the First and Fifth Amendments, but were immediately met with the objection that suits in the district courts against the IRS can only take the form of tax refund actions. Since we owe no taxes, the IRS argued that we have no access to the courts, unless and until we made ourselves liable for taxes by violating the law.

The courts accepted this IRS argument, in reliance on the recent Supreme Court opinion in *Bob Jones University* v. *Simon*, 416 U.S. 725. We sought, unsuccessfully, before both the District Court and Court of Appeals for the District of Columbia Circuit, to distinguish the *Bob Jones* case—in which the plaintiff had an obvious, if delayed, refund remedy—from our own situation in which a refund remedy is available only if:

(*a*) We embark on a conscious program of law violation, with the objective of causing an IRS assessment of penalty taxes.

(*b*) We are willing to undergo the certain bankruptcy that would follow from IRS withdrawal of our charitable and educational status, and

(*c*) We are able to find the resources after bankruptcy to prosecute a tax refund suit involving difficult Constitutional issues.

Obviously, a "judicial remedy" of this sort is no remedy at all. Accordingly, we continue, week by week, to censor an important channel of information for the press regarding IRS actions. But we are very unhappy indeed with a situation in which we are subject to censorship, under vague and ill-defined rules, by the very agency whose actions we seek to scrutinize. For us, at least, the First Amendment is a nullity.

Furthermore, this nullification of the First Amendment has serious implications for the future. The courts have said, in effect, that they will stand aside when the tax system is used to violate rights guaranteed by the Constitution to the voluntary sector of our society.

But, you may object, voluntary organizations enjoy the benefit of tax exemption. So we can authorize the IRS to violate their Constitutional rights if it chooses. The short answer to this contention is that the Supreme Court has repeatedly

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[1] Tax Analysts and I have been contesting these rulings in court for 2 years. Tax A/A has sought to establish standing as a representative of citizen and taxpayer interests, and I have sought standing as the owner of a domestic oil well, who suffers competitive harm as a result of tax favors to foreign producers. The District Court for the District of Columbia has ruled that neither Tax A/A nor I are within the "zone of interest" protected by the courts. The case is now on appeal.

held (and presumably will continue to hold if the Constitution means anything) that indirect violation of Constitutional rights through the tax system is as reprehensible as direct violation of those same rights through financial penalties, police harassment, and other means.

This situation is a matter of serious concern to thousands of voluntary groups throughout the country, which are subject, like ourselves, to vague and capricious IRS censorship with respect to their publications. I find it shocking that these organizations can vindicate their Constitutional rights only if they first violate the law and run the risks associated with IRS audit and bankruptcy.

WHAT NEEDS TO BE DONE

The doctrine of standing is the root cause of the problems involved in taxpayer challenges to illegal IRS administrative action. That doctrine is, in the words of the late Justice Harlan, "a word game played by secret rules". At bottom, it is a way in which the courts regulate their workloads.

Regulating the workload of the courts is an important objective, but surely there is no justification for a rule that grants prompt judicial review for all pocketbook interests that are immediately affected by IRS action, and denies review when the IRS engages in illegal action that affects taxpayers generally. That rule has the grave demerit of making our courts little more than a convenient device for special interest claimants. Meanwhile, the historical role of the courts in protecting citizens from arbitrary and illegal executive action is neglected.

There are ways of regulating the workload of the courts short of making unreviewable a substantial number of important IRS administrative determinations. Included are rules that would establish a Taxpayer Protection Agency as an independent office in the Treasury Department, with power to bring questionable IRS decisions to court. Alternatively, we could grant a right of action to taxpayer groups that meet specified membership and financial requirements, which are indicative of broad public acceptance of their goals.[2] The precise nature of the remedy to be adopted can be discussed later. The important point for present purposes is that the IRS should not remain immune from judicial review when it gives away money. That is far too sensitive a matter to be left to the unbridled discretion of administrators, no matter how honest or well-intentioned they may be.

As for protection of the rights of nontaxpayers, it seems to me that an amendment to the judicial code is needed. It should make clear that no individual or group is required to violate a non-criminal statute as a precondition to a suit designed to vindicate Constitutional rights that have been violated by the IRS. Such a statute would establish the inadequacy of legal remedits in this area, and would therefore clear the way for the exercise of equity jurisdiction by the courts.

I hope that these comments are helpful to you. I will be glad to answer any questions that you may have.

Senator TUNNEY. Mr. Davidson you may proceed with your statement.

TESTIMONY OF JAMES DALE DAVIDSON, EXECUTIVE DIRECTOR, NATIONAL TAXPAYERS UNION

Mr. DAVIDSON. Thank you, Senator. I appreciate the opportunity to discuss an issue which I believe is very important; perhaps more important than some of the others discussed. That is the fact that the IRS, which reaches into the home of every citizen, has the ability to push around people who are taxpayers, not only the ones who are not taxpayers. I think that the operational costs for a citizen to secure his constitutional rights in tax issues are purposefully designed to be far higher than the normal issue at stake, so we have what I call a banana republic style of justice, which is akin to that

[2] Something similar has been done, for example, to separate legitimate Presidential candidates from splinter candidates, when determining eligibility for Federal campaign funds. Under those rules, a candidate must demonstrate broad public support before becoming eligible for funds. A similar demonstration might be demanded as a precondition for taxpayer standing in court.

found in any country around the world where a citizen with a vast pocketbook and a very exotic knowledge can obtain his own differential justice by bribing the proper officials. By paying a very high cost, he can thereby be immune from whatever weighs down on the rest of the public.

Now, the same sort of situation occurs with the Internal Revenue Service. We just heard a discussion of the doctrine of "void by vagueness." If that were consistently held, the Internal Revenue Code would be entirely stricken from the books because certainly it is quite vague and most citizens have no real idea of what the code consists of or what they are required to pay.

Which brings me to an additional point which I believe is very slightly considered but it is quite important, and that is the perception of justice. Because the Internal Revenue Code is so vague the IRS has said in a loose moment that 99.9 percent of all returns have errors that could be discovered if anybody wanted to dig into them. The citizen, recognizing this, feels that he has a choice between submitting to whatever is asked of him or possibly being in jeopardy of running a great bill and then loosing anyway.

We found that 44 percent of the people who filed returns in the current year went to the H and R Block or some similar organization for professional assistance, and many of these people were individuals who had worked for wages and had no real complexities in their return. So I think this is just one statistical indication of the large feeling of low-grade paranoia that exists in the country. People feel "I cannot get justice from the IRS," and they are quite right normally in thinking that.

We discovered something which might be of some embarrassment to the Congress—I am sure we are not the only ones who discovered it—that in the Tax Reform Act that was passed and signed on December 23, 1975, unbeknownst to itself, the Congress generously repealed the corporate income tax. Now, this was done by error, obviously, but still it shows that none of the Members of Congress who voted this through bothered to penetrate to the specific meaning of the paragraph in law which was being changed. Of course the citizen himself can scarcely be thought of as having any greater insight into these particulars of law. And there is no reason why one should be burdened with that type of knowledge.

It is notable that since this tax has been repealed for more than 6 months not one case has come to court to my knowledge, challenging the legality of a tax which has since been repealed. This again shows the tremendous extent to which the constitutional protections are discouraged for economic reasons in the collection of taxes. Almost everyone knows, regardless of the legalities, that the courts could not afford to dismiss a large source of revenue; hence, while the law and logic are on one side, the economic expediencies are on the other. The citizen suffers for this.

The Government's purpose in making it very difficult for individuals to obtain their rights is perhaps counter to the general issue of stability in the system. The tremendous resistance which I see to the IRS and the reaction which I had to an article which I wrote in the April issue of Playboy Magazine, pointing out some of the specific examples of how IRS has abused the rights of taxpayers, show that

many people are afraid. I have had 50 people come to me and say, "Gosh I thought that was a great article, but I would be fearful to write a letter because IRS would investigate." And, the researcher that I had working on the article has already received her notice of audit. I look at my mailbox nervously.

I think that this type of feeling, that injustice is the nature of the system and that justice could only be had if you had a vast pocketbook and a great knowledge of how the system works, is something which in the long run will destroy the society. That is why I feel that several specific steps which I have outlined in my testimony ought to be taken. First, that the Congress should make its will clear that the constitutional protections do apply to taxpayers and that due process of law is not suspended when money is at stake. And the laws ought to be simplified to the extent that the taxpayer has an opportunity to understand them. Furthermore, we need to redress the great diseconomies which fall on a citizen for trying to protect his rights. We have to make the cost of protecting a taxpayer's right less than the money at stake, and if the average taxpayer in a dispute with the IRS has a tax question of less than $2,000 it cannot cost $100,000 to assert his constitutional rights. We would like to see that in cases where the constitutional issue is at stake that the Government would—if a citizen is vindicated—pick up the expense of protecting these rights. These rights really do apply to everyone, and the aggravation which we feel, while it may be great, with a toaster which does not work or a car that will not start or whatever, is minimal compared to the general aggravation which we all feel at being powerless before a body like the Internal Revenue Service, which, as we know, spreads everywhere.

Senator TUNNEY. Well, just on that point, what about the appointment of a small claims court for, let us say, a claim by the IRS of $2,000 or less, there being the ability to have an attorney though only a summary judgment is issued; if you go before this judge and not have to appeal: Just a decision made on the spot with regard to a tax claim of $2,000 or less?

Mr. DAVIDSON. Well, of course we do have a court of claims where small issues can be heard. But the difficulty here as with the Tax Court itself, which has been designed by Congress in the past in a futile attempt to try to answer this problem, is that these courts by their nature almost always hold that it would be grandiloquent on their part to favor any constitutional argument so they seldom do.

If a taxpayer comes to a court with a claim that taxes are being levied on him on the basis of information which was illegally obtained, for example, the courts have not ruled that the Government would waive the attempt to seize the revenue on that basis, and none of these small courts would be willing to accept these issues. The general issues which arise out of the failure of due process and the failure to observe constitutional rights as we generally consider them in tax issues do not seem to interest these courts, and that is why I think that a congressional resolution instructing the court, the Tax Court, and the Court of Claims that constitutional issues are pertinent to tax issues would be in order.

Senator TUNNEY. Mr. Field, do you have any comment on that?

Mr. FIELD. I am thinking of former Dean Erwin Griswold of the Harvard Law School, who labored as a young man in the Solicitor

General's office, essentially causing the problem which has just been described. Basically the Supreme Court held 40 years ago that equal protection issues could be raised only with great difficulty in the Federal tax area. The Court gave virtually carte blanche to the Congress to distinguish between, say, oil producers who pump liquid out of a well and who get percentage depletion, and water producers who also pump liquid but do not; to distinguish between married and single; between heads of households and others. It seems to me the Court went very far at that time, but I am not certain whether a statute is needed here or some rethinking of the reach of those early decisions of the late 1920's and early 1930's. In short, it seems to me is that the problem here is basically a problem of rethinking the equal protection decisions of the Supreme Court of about 40 years ago, which Dean Griswold was instrumental as a young attorney in arguing on behalf of the government. It may be, in short, that this particular program is one that the courts could correct for themselves.

Perhaps Mr. Davidson can suggest a statutory route, and sometimes a statutory route has the great virtue of being both quicker and clearer.

Mr. DAVIDSON. Well, I think that certainly the courts have taken their lead in this issue from the Congress, inasmuch as the Congress has labored unsuccessfully to reform the tax structure and to make it equitable. The feeling that one gets very quickly in investigating the tax issues which involve constitutional rights, is that the courts feel that Congress really does not mean for the constitutional rights to be taken seriously and extended in the same way that they are in other areas routinely. For example, one issue which I would specifically point to, which can be definitely corrected by legislation, is that in tax issues where the Internal Revenue Service is facing the individual citizen as an adversary, the courts maintain the fiction that the individual citizen, who is obviously the defendant in an adversary proceeding, is a plaintiff and not a defendant. Now, if the Congress were to simply define his position as everyone in commonsense knows it is, as a defendant, then this would grant to him immediately protections of due process which are routinely waived by this very slippery definition. That is one of the sorts of corrections which ought to be considered.

Senator TUNNEY. Well, I could spend a great deal more time talking about it. I hope that you will make some of your specific suggestions known to the committee. I mean, you have discussed it generally very effectively today, but if you do have any specific recommendations as to legislative changes—and I think the definition that you have just suggested—making the taxpayer the defendant and the constitutional protections of a defendant is a very good suggestion. It is one that I would like to think through as a possible means of developing legislation to cure that problem.

But I am going to have to move on because we have a limited time period.

I want to thank you both for being here.

Mr. FIELD. Thank you, Mr. Chairman.

[The prepared statement of James Davidson follows:]

PREPARED STATEMENT BY JAMES DAVIDSON, EXECUTIVE DIRECTOR OF THE NATIONAL TAXPAYERS UNION

As this committee will no doubt hear many times in the course of its deliberations, the value of a constitutional right is directly proportionate to the ease with which it can be exercised. A right which can be secured only at high cost is scarcely a right at all.

When the cost to most persons of securing constitutional guarantees greatly exceeds the cost of submission, the effect must be to undermine the distinctions upon which we rightly pride ourselves, between our constitutional system of government and all other forms. In different words, by placing the cost of securing constitutional rights too high, we negate those rights, and convert our system into one in which liberty is a matter to be advanced or restricted solely as it is economically expedient. A dispassionate study of comparative political systems reveals that it is usually possible to obtain relief from tyranny in any system, no matter how arbitrary and despotic, if you are willing and able to pay a high price. If you have the financial resources to bribe the necessary officials, and you have the know-how to approach them, you may be able to obtain a highly differential and quixotic relief. Of course, in such systems there is no rationalized procedure by which the masses may secure the same relief from despotism for themselves. In despotic systems the masses lack both the financial resources and the knowledge to obtain justice.

It is in light of this analysis that the National Taxpayers Union invites this committee to consider the constitutional rights of Americans as taxpayers. You will discover that in all too many instances, the cost to the average taxpayer of asserting his constitutional rights far exceeds the sum which he would lose by waiving those rights and submitting to the claims of the tax collecting body. In ways too numerous to be fully listed here, the tax collecting system bears down upon the individual with a force which far outweighs his theoretical protections in due process of law. For example, the only courts where the entry costs for the taxpayers would not normally exceed the disputed tax payments—the tax court or small claims court—do not entertain constitutional arguments. Thus, unless the procedures which are followed by these courts insure full protection of a taxpayers' rights, the courts themselves are no help.

Furthermore, the pretense that both parties are "plaintiffs" in tax cases deprives the taxpayer of numerous constitutional protections which normally shield citizens in adversary proceedings. Rather than impose on the government the full burden of proving wrongdoing by the taxpayer, the IRS is generally free to make accusations and thereby shift the burden onto the taxpayer of proving his innocence. Because the vast powers and legal resources of the government are arrayed against him, the individual taxpayer who feels himself to be the victim of injustice often must choose between two unjust alternatives: submission, or vindication by bankruptcy. He personally must bear all the operational costs of asserting his constitutional rights. If, after long and expensive deliberation, he is vindicated by the court, there is no provision for the government to absorb the high courts costs which it imposes.

Clearly, the situation is one in which the vast majority of the population doubts that it can obtain justice in tax matters. I could site more examples than this committee has time to consider which tend to validate this popular opinion. But let me point to one revealing evidence of the low grade paranoia which afflicts the population on tax questions: 44% of the citizens filing tax returns in 1974 were afraid to send in their returns without consulting "experts". The great majority of these returns were simple cases of persons who worked for wages and were due refunds. Yet, fear is so widespread that these millions went out of their way to spend money for professionals to check their judgement before filing a return.

This not only exemplifies the deep-seated fear abroad in the countryside, it points to another grave shortcoming of the system. Taxpayers cannot exercise their constitutional rights as taxpayers partially because they lack the knowledge to do so. The reputed boast that "IRS can find errors in 99.9% of all returns if it wants to" could not be more appropriate. No one understands the Internal Revenue Code. With all due respect to the distinguished gentlemen here, members of Congress themselves could not wrestle with the meaning of many specific

clauses in the Internal Revenue Code without being thrown. There is no better example than the recent revelation of Congress' unintended generosity in repealing the corporate income tax in the tax reform measure signed into law on December 23, 1975. Quite evidently, not one member of Congress bothered to, or was able to penetrate the specific meaning of the changes made in the law. How then, could the citizen be justly bound to know more?

A further question arises from the "repeal" of the corporate income tax which bears directly on the topic at hand. Why is it that not one law suit throughout the United States has been filed to challenge the collection of a tax which has been repealed? Why indeed, does not the prohibition of *ex post facto* legislation intervene to prohibit the passage of a retroactive tax bill? Obviously, it does not, and the received legal opinion would not even entertain such an argument. The reason, it seems to us, is not from any shortfall of logic in the argument itself, but because of the more palpable shortfall of revenue in the Treasury which might result were the citizen's constitutional rights as a taxpayer to be enforced.

The National Taxpayers Union disputes the supposition that economic expediency should so fully outweigh the constitutional rights of citizens in tax matters. The 16th Amendment did not repeal the rest of the Constitution. Congress should make that clear. A "Sense of the Congress Resolution" perhaps tied to the current resolution reinstating the Corporate Income Tax, should assert the intention of Congress to protect the constitutional rights of citizens in tax matters. And to make that necessary statement more than a rhetorical show, specific changes in the law should be made, providing what every taxpayer already knows, that the defendant in legal matter involving taxes is a defendant, not a plaintiff. Furthermore, the system which requires vindication by bankruptcy should be changed to lower the cost to the citizen of asserting his constitutional rights. In these cases where the government is found at fault, the government should pay reasonable legal fees. The cost to the government would be more than compensated for by the increased perception that justice is available through the system, and that one's constitutional rights are not merely something to bargain for economically, like favors to be purchased in a banana republic, but strong protections which apply to everyone regardless of his resources.

Senator TUNNEY. Our next witness is Aryeh Neier, executive director of the American Civil Liberties Union.

TESTIMONY OF ARYEH NEIER, EXECUTIVE DIRECTOR, AMERICAN CIVIL LIBERTIES UNION

Mr. NEIER. Thank you very much, Senator Tunney.

I am accompanied today by Prof. Burt Neuborne, a professor of law at New York University, counsel to the American Civil Liberties Union in many cases, and an expert on questions of Federal jurisdiction.

We are very grateful for the opportunity to be here, and we are very grateful that this committee is considering the issue that is before you today.

If we may, we would like to submit our prepared testimony for the record, and then briefly summarize and amplify a few points that are contained in the prepared statement. I would like to lead off with a few general comments and then turn to Professor Neuborne for some specific analysis of what the Supreme Court is doing and what remedies there may be that the Congress could consider for dealing with some of the recent actions by the U.S. Supreme Court.

In offering a general comment, I would say that the law traditionally has been perceived by most people in most parts of the world as an instrument for upholding the status quo. It was not that way for what now seems like a far too brief period in American history. It was not that way during the 1950's and the 1960's. The American courts, particularly the U.S. Supreme Court and the Federal judiciary, played an extraordinary part in the history of the 1950's and the 1960's.

It was a turbulent period in American history; there were wide-ranging pressures for social change; many groups of people previously disenfranchised by reasons of race, sex, status, dependency or youth sought the full protections of citizenship. The Federal courts were a forum open to them to accommodate those pressures. While the Federal courts did not always side with the people who were seeking changes, the very openness of the Federal courts and their willingness to hear the claims for full citizenship, had a profound impact. This produced very substantial and very beneficial social changes. The courts channeled the activities of people seeking redress of their grievances into orderly and lawful paths in which claims for benefits became claims for rights. Grievances were adjudicated in the context of the U.S. Constitution.

I think we got out of that period of intense pressure peacefully and with many beneficial social changes largely because of the availability of the Federal courts to hear those claims, consider them on their merits and their willingness to redress grievances. We also got out of a period of tremendous national dissension over the Vietnam war in a relatively peaceful manner, perhaps because of the willingness of the Federal courts to hold themselves open.

In the last several years that has all changed. This U.S. Supreme Court has devised a series of mechanisms for slamming shut the doors of the Federal courts. I think that that is a matter of very grave significance for the United States. Many of the promises that were held out during the 1950's and during the 1960's have not yet been fulfilled. Yet the Federal courts today are frustrating the ambitions of people who are still not fully enfranchised to enjoy the full rights of American citizenship.

I do not think we can begin to calculate just what the cost is going to be. But we do know that there is an atmosphere in the United States today of great pessimism. We think of many social problems as getting worse. We see ourselves further and further away from solving the problem of racial inequality; we see ourselves further and further away from solving the problems of the poor and the dependent in American society; and we see the possibilities emerging again of widespread discontent in American society.

For these reasons, it seems to us extremely important to begin to open up again the doors of the Federal courts.

The Supreme Court has played a very peculiar role in the last several years. It has not overturned many of the substantive decisions of the earlier Supreme Court, and it has not reversed the particular decisions which grant rights to people who were previously disenfranchised. Instead, the Supreme Court has made it impossible for those people to get into the court in order to assert those rights. It is reminiscent of Franz Kafka's novel, "The Castle." In "The Castle" the land surveyor is constantly frustrated at his inability to get inside the castle; if he can only get inside all of his problems will be taken care of. But one after another bureaucratic device is set in his way and he can never get inside. He can never get an audience. He can never have an opportunity to state his grievances. That is approximately what this U.S. Supreme Court has done; it has created a Kafkaesque world in which people find themselves frustrated at getting into the Federal courts in order to assert their rights. If they

could only get in, if they could only overcome the various standing problems and jurisdictional problems this Supreme Court has set in their way, then they might be able to assert the rights which this Supreme Court has still left undisturbed. This is a matter of the gravest significance for a nation that wants to accommodate pressures for redress of grievance in an orderly way and in a way consistent with the American Constitution.

At this point, if I may, I would like to ask Professor Neuborne to deal with some of the specific obstacles that the Supreme Court has created and some of the ways in which the Congress might be able to help us in dealing with those obstacles.

TESTIMONY OF BURT NEUBORNE, PROFESSOR OF LAW AT NEW YORK UNIVERSITY

Professor NEUBORNE. Thank you.

Senator Tunney, we appreciate this opportunity to discuss what is becoming a problem of very serious dimensions to attorneys in this country who are attempting to enforce constitutional rights.

Traditionally and historically, in this country, the primary forum within which one could expect to receive a sympathetic hearing on issues of Federal constitutional rights has been the Federal trial courts. Now, of course, State courts have a concurrent responsibility to enforce the Constitution of the United States and, indeed, the State courts of your own home State, the State of California, have pioneered in many constitutional decisions which have led the way toward the enforcement of rights. Unfortunately, that is not a national phenomenon, and it remains the fixed view of virtually every experienced civil rights lawyer that one is likely to get a more sympathetic hearing and a more effective redress of grievance if one is permitted access to a Federal court to enforce Federal constitutional rights rather than being forced to go into a State court to do so.

A majority of the current Supreme Court has placed a series of extremely difficult obstacles in the way of persons seeking to secure redress of Federal constitutional rights in Federal court. First, the current Court has dramatically expanded the standing doctrine in recent years; making it virtually impossible for large numbers of Americans who have festering constitutional grievances and who are every day suffering violations of their constitutional rights to find a judicial forum, any judicial forum, within which to present their constitutional grievances to a Federal or a State judiciary.

Most recently, two decisions of the Supreme Court illustrate this ominous trend. In 1975 black residents of the city of Rochester were denied the opportunity to litigate in Federal court the constitutionality of a pattern of exclusionary zoning which had, in effect, condemned them to ghetto existence in the inner city of Rochester and frozen them out of the surrounding suburbs. They were refused the opportunity to litigate the constitutionality of that exclusionary zoning pattern on the ground that none of them could show a particular suburban housing project which they might have lived in but for the exclusionary zoning. Well, the exclusionary zoning prevented the planning or building of any housing projects, and so the decision acted as a kind of crude Catch-22, which froze these poor people

out of court precisely because the exclusionary zoning pattern worked so well so that there were no existing or, even, planned housing projects.

Recently, in Philadelphia, black citizens of the city of Philadelphia, after demonstrating to a Federal judge who held a scrupulous trial, a pattern and practice of unredressed police abuse in the city of Philadelphia resulting in systematic deprivation of constitutional rights were denied an opportunity to seek redress in Federal court from those clear violations of their constitutional rights, because the individual plaintiffs in that case could not show that the mayor of Philadelphia was actually doing something to them at that moment.

Well, cases like that, which keep people with live, real grievances out of the Federal courts, renege on the promise that the Constitution provides that there will be some judicial forum within which real constitutional grievances can be redressed.

I hasten to point out to the subcommittee that, thus far, the decisions of the Supreme Court in this area are subject to legislative reform. The Supreme Court has been, thus far, quite clear that it is adopting restrictive standing doctrines in a prudential capacity because it feels that it wishes to close the flood gates of litigation; it feels that without congressional guidance it does not want to enter these areas. It has made it very clear that if Congress will give a signal to the Supreme Court that it is to adopt a liberal posture with respect to standing and to allow people like the Rochester inner-city residents and the citizens of Philadelphia access to the Federal courts, that the Supreme Court will not stand in the way of that congressional judgment. We suggest that it is one of the critical items on the congressional agenda to do something about the doctrine of standing to make sure that persons with genuine constitutional grievances do have some forum within which to redress those grievances.

A second recent series of Supreme Court decisions which makes it very difficult for persons to gain access to Federal court and to litigate issues which affect their lives, is illustrated by the case that you heard a little bit about this morning, the case of *Paul* v. *Davis*. This Supreme Court has very narrowly construed the nature of the injury which will give rise to a constitutional violation under section 1983, which is the cause of action statute which allows people to invoke the jurisdiction of the Federal courts on constitutional questions. It has very narrowly construed 1983 to the point where the knowing and malicious dissemination of false information about an individual by a policeman, which seriously injures that individual, has been held by the Supreme Court not to be sufficient to allow an individual to litigate that grievance in Federal court. Well, that seems to be an outrageous narrowing of the spectrum of injuries which Federal courts are really there to give relief for. If you cannot rely on a Federal court to protect you against a State law enforcement official who has gone haywire and who is disseminating information about you in a malicious way, who can you go to?

That seems to me to be a primary function of the Federal court.

Once again, it is clearly within the power of Congress, if Congress wills it, to make it clear to the Supreme Court and to the lower Federal courts, that grievances like this are appropriate for resolution in the Federal courts and should be among the primary concerns of the Federal courts.

Finally, in a very disturbing series of decisions, the Supreme Court has begun to enunciate something coming very close to a doctrine of exhaustion of State judicial remedies before seeking relief in a Federal court for a constitutional violation.

It has been the law in this country for some time, and I think most people would tell you it continues to be the black letter law, that a civil rights plaintiff need not exhaust his State judicial remedies before going into Federal court. The Supreme Court continues to give lipservice to that rule as a matter of general practice. Unfortunately, though, what the Court has done is to erect a virtual de facto exhaustion of State judicial remedies by expanding the notions of abstention, by radically expanding the notion of comity and by imposing doctrines such as "core" habeous corpus in a series of technical, low-visibility decisions. These decisions have imposed, across the spectrum of civil rights litigation, an 80-percent requirement of exhaustion of State judicial remedies. Currently, in order to gain access to a Federal court, a litigant in a civil rights case is forced to run a maze, a jurisdictional maze of such complexity that there are rarely lawyers with the stamina, the time, and the experience to successfully traverse what is now an extraordinarily narrower path into Federal court. These jurisdictional devices frustrate people who are seeking to take advantage of what ought to be a clear, expeditious, and effective remedy in Federal court for their constitutional violations.

You have already heard this morning two other areas of serious concern to those persons seeking to redress constitutional rights in Federal courts: the demise of the class action as an effective vehicle for the resolution of these controversies, and the destruction of the court's traditional ability to award attornerys fees in deserving cases. Apart from simply noting that both of those areas are of critical importance, I would like to discuss a fourth area of judicial action which is seriously impeding the ability of lawyers to redress constitutional violations in Federal court—the assault by this Supreme Court on the ability of the lower Federal judiciary to give adequate remedies to persons who come into court. If you are lucky enough to satisfy the standing doctrine, if you are lucky enough to traverse the narrow abstention comity device and find yourself in Federal court, and if you are lucky enough to win, you still have won only 10 percent of the battle, because the other 90 percent of the battle will consist of persuading the Federal judge that, under current Supreme Court law, he has the power, or she has the power, to grant you adequate remedies in your case.

In recent days, we have seen the Supreme Court say that a Federal court lacks the power to grant compensatory damages against a prosecutor who has willfully used perjured testimony to secure a conviction. If the defendant in a constitutional case is a prosecutor or if the defendant is a judge or if a defendant is a municipality or if a defendant is a State agency, under recent decisions of the Supreme Court, there may be no way for a Federal judge to award damages to an injured constitutional litigant.

It seems to me that it is downright dishonest to provide a Federal judge with the obligation of enforcing constitutional law; to provide a litigant with the assumption that there is a forum in which constitutional law can be enforced; but then to come down to the final day of

judgment and be told by the Federal court that there are no damages for you, there is no compensation for you; maybe we can enunciate norms of behavior that will help other people, but there is nothing that we can do for you.

Consistent with the cutting back of the ability to award damages, this Supreme Court has radically cut back in the last 2 years on the ability of the lower Federal courts to evolve effective equity devices, imaginative injunctive devices, to both redress the past violation of constitutional rights and prevent the future violation of constitutional rights.

In that case arising out of Philadelphia, the *Rizzo* case, that I mentioned earlier, a Federal judge, in what was an imaginative way of dealing with a serious and explosive situation, directed the mayor of the city of Philadelphia to set up a grievance review board, some sort of mechanism for dealing with complaints against the police. The judge did not say how the board was supposed to act, he did not say what the board was supposed to do; he just said, "Listen, you cannot have an effective redress of grievance here unless you have some forum," and he directed that they set up a forum for the resolution of these disputes. The Supreme Court reversed that decision, indicating that the Federal judge had gone beyond his correct role in seeking to fashion this type of affirmative relief. That is similar to a decision that they handed down reversing a similar decision out of Cairo, Ill., where a Federal judge had fashioned imaginative equitable relief to try to deal with rampant racial discrimination in the enforcement of justice in Cairo, Ill.

In both situations the power of an equity court, the traditional power of the equity court, was cut back by the Supreme Court. Once again, Senator Tunney, I think that those decisions are also amenable to reform and to reversal by expressions of congressional will. If Congress made it clear that it does not wish the Civil Rights Act of 1871, which is the section 1983, to be burdened with the traditional common law immunities, then courts could act in this area. If Congress made it clear that lower Federal courts are to have adequate equitable capacity to fashion remedial relief, then the courts would be free to do so.

I think, just in conclusion, as Mr. Neier mentioned, the current court has not cut back on substantive rights dramatically. There have been decisions that one can be concerned about in the last term or two, but by and large the legacy that the Warren Court left us, of an expanded notion of constitutional freedom, is still intact. There are rights which American citizens can enforce if only they are given the forum and the lawyers to do it.

Thank you.

Senator Tunney. Thank you. I want to thank you both for your statements, and I have many questions. Unfortunately, under the rules of the Senate, our hearings have to end at 12 noon unless we get special permission of the Senate, so I am going to have to adjourn the hearing now. I think that you both have made a very significant contribution to our deliberations, and I must tell you that the sum total of the testimony that we have had today leads one to believe that the Congress is going to have to take effective action to give greater access to citizens to the courts, because I sense—and you do not have to be very empathetic to sense it—a tremendous frustration on the part of

those who, as teachers and as students of the Supreme Court, or following the case law on a day-to-day basis, as well as the average citizen who finds that the door to the courts has been slammed down. And I must say that the statement that we heard from Mr. Davis, was a very compelling articulation of a man deeply frustrated, deeply hurt, and without any escape route, or any hope to get out of the swamp and pull himself out. I just think that it is an outrage.

Well, thank you very much. I look forward to working with you and others that have testified today to see if we can develop some legislation which will cure some of the clearest examples of the Court's desire not to curtail access to the Federal judiciary for the purposes of curing these wrongs.

Thank you very much.

[Whereupon, at 12:08 p.m., the subcommittee was adjourned.]

[The prepared statements of Mr. Neier and Mr. Neuborne follow:]

PREPARED STATEMENT OF ARYEH NEIER[1] AND BURT NEUBORNE[2] ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION

We appear here today on behalf of the American Civil Liberties Union, a nation-wide non-partisan organization of 275,000 members dedicated to the advancement of the principles of the Bill of Rights.

In your letter of invitation, Mr. Chairman, you noted that this is the 70th anniversary of Roscoe Pound's address to the American Bar Association on the causes of popular dissatisfaction with the administration of justice. When Roscoe Pound embarked upon his critical re-examination of the role of law in American life, he unleashed a current of legal idealism which has sought to transform American law from a device for the maintenance of the *status quo* into a device for the just resolution of disputes. We have come a long way from Pound's beginning. When Pound wrote, in 1906, only the rich and the powerful could view American law with satisfaction. Powerless segments of American society correctly perceived law as a hostile force. The primary role of law was the protection of privilege. It is a tribute to how far we have advanced in the last 70 years that the weak and the powerless have come to regard American law, not necessarily as an implacable enemy, but as a potential ally which provides them with hope for justice.

Mr. Chairman, we are grateful, on behalf of the American Civil Liberties Union, for the opportunity to discuss with you a disquieting phenomenon which threatens much of the progress we have made toward realizing Roscoe Pound's dream of equal justice through law. During the last several decades, two extraordinary occurrences have made possible our progress toward Pound's dream—the emergence of the Federal judiciary as an easily accessible and sympathetic forum for the protection of the rights of the politically powerless and the growth of a segment of the American Bar dedicated, not to servicing the rich and powerful, but to vindicating the rights of those who traditionally have lacked access to the courts. The combination of a receptive Federal judiciary and an idealistic civil rights-civil liberties bar culminated in the transformation of law from the preserve of the privileged to an engine of social reform. In the last few years, however, the ability of the Federal judiciary to perform its historic and primary function as guardian of the United States Constitution has been seriously undermined by a series of restrictive decisions of the current Supreme Court. Moreover, at the same time that the current Court has sought to restrict access to the Federal courts, it has delivered a series of severe blows to the newly emergent public bar. Mr. Chairman, if the current majority of the Supreme Court is permitted —by shutting down access to the federal courts and by crippling the public bar—to dismantle the apparatus which was responsible for the transformation of the role of law in our society, the progress of the last seventy years will evaporate. To much of America, law will, once again, become the enemy to be feared and evaded, rather than an ally to be respected and revered.

The current Court's assault on the role of the Federal judiciary and the public bar has occurred in four areas. First, the Court has severely restricted access to

[1] Aryeh Neier is Executive Director of the American Civil Liberties Union.

[2] Burt Neuborne is Professor of Law at New York University and former Assistant Legal Director of the American Civil Liberties Union.

the Federal courts by aggrieved individuals; second, the Court has placed significant, and perhaps, insuperable obstacles in the way of persons seeking to band together to seek class action relief from the Federal courts; third, the Court has struck a blow at the continued existence of an independent public bar by denying Federal courts the power to award attorneys fees in many cases; and, finally, the Court has drastically restricted the ability of a Federal court to grant meaningful remedies—even to successful plaintiffs.

I. THE RESTRICTION OF ACCESS TO THE FEDERAL COURTS

Since the Civil War, the Federal trial courts have served as the primary enforcement arm of the Bill of Rights and 13th, 14th and 15th Amendments. While state courts retain a concurrent obligation to enforce the Federal Constitution, it has been the lesson of our history—and it remains the fixed belief of virtually every experienced civil rights lawyer in America—that Federal courts provide the most effective forum within which to enforce the Constitution of the United States.

Congress has codified this judgment in the Civil Rights Act of 1871, (42 USC § 1983) which guarantees a Federal judicial forum whenever state or local officials interfere with Federal constitutional or statutory rights. Unfortunately, the command of Congress has been severely weakened by the current Court.

First, in cases like *Warth* v. *Seldin*, 95 S. Ct. 2197 (1975) and *Rizzo* v. *Goode*,— U.S.—(1976), a majority of the current Court has restricted the class of persons who may complain to the Federal courts about violations of their Federal constitutional rights. In *Warth*, the Court ruled that minority residents of the Rochester area could not challenge suburban exclusionary zoning practices which condemned them to a ghetto existence because they were unable to point to a specific housing project which they would have resided in, but for the exclusionary zoning. Of course, the very existence of exclusionary zoning prevented the planning or construction of such projects—reducing the decision to a crude exercise in Catch–22. In *Rizzo*, the Court ruled that Black citizens of Philadelphia, who had been the target of proven police abuse, could not seek an order directing the Mayor to establish a police complaint procedure, since they were not currently suffering any abuse at his hands. The extremely crabbed view of the standing doctrine enunciated in cases like *Warth* and *Rizzo* [3] as a "prudential" matter by a majority of the Court, leave thousands of Americans with festering constitutional grievances, but without a Federal court within which to resolve them in an orderly manner.

Second, in cases like *Paul* v. *Davis*—U.S.—(1976), the current Court has read the Civil Rights Act of 1871 in a grudging manner to refuse access to the Federal courts to persons who have been seriously injured by lawless government action. In *Paul*, a police flier had erroneously stigmatized the plaintiff as a "known" and "active shoplifter." When the erroneously stigmatized plaintiff sought Federal judicial relief, the Supreme Court ruled that police injury to reputation—even if knowingly and maliciously caused—was not a deprivation of constitutional rights and, thus, could not be redressed in Federal court. Thus, persons whose lives have been seriously affected by lawless governmental action are denied access to a Federal forum, unless they can shoehorn their injury into the narrow constitutional categories enunciated by a majority of the current Supreme Court.

Third, the current Court has dramatically expanded the doctrines of abstention and comity to force case after case out of Federal court. Despite the ruling of *Monroe* v. *Pape*, 365 U.S. 167 (1961) that civil rights plaintiffs are not obliged to exhaust state judicial remedies prior to seeking relief in Federal court, the current Supreme Court has clamped a *de facto* state judicial exhaustion requirement on civil rights plaintiffs—imposing a delay of from 1–2 years before many civil rights plaintiffs may gain access to a Federal forum.

The availability of expeditious Federal relief from constitutional violations has been a critical factor in transforming abstract constitutional doctrine into practical reality. Accordingly, the draftsmen of the Civil Rights Act of 1871 and eight members of the Supreme Court in *Monroe* v. *Pape* recognized that the delay which would be caused by requiring resort to state court as a pre-condition to Federal judicial review would destroy 42 U.S.C. § 1983 as an effective device for the protection of Federal constitutional rights. Accordingly, it is now well settled that a civil rights plaintiff need not exhaust state judicial remedies before seeking

[3] Other recent cases similar restricting standing are: *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *United States* v. *Richardson*, 418 U.S. 166 (1974); *Laird* v. *Tatum*, 408 U.S. (1972).

Federal judicial review under the Civil Rights Act of 1871. Unfortunately, however, the current Court has made a mockery of the notion of direct and uncomplicated access to Federal courts by imposing at least three forms of state exhaustion on prospective civil rights plaintiffs.

First, in *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), the current Court invented a species of cases falling within the term "core habeas corpus" in connection with which it imposed a requirement of exhaustion of state judicial remedies.

Second, in a series of cases exemplified by *Boehning* v. *Indiana State Employees Association*—U.S.—(1976), the current Court has dramatically broadened the concept of abstention into a virtual *de facto* exhaustion requirement. In the view of Chief Justice Burger, and perhaps a majority of the current Court, whenever the challenged action of a state official might violate state constitutional or statutory law, a civil rights plaintiff must seek relief in state court on state law grounds, prior to seeking relief in Federal court. If such a view of abstention/exhaustion prevails—and there are disturbing signs that it may—speedy access to Federal court will become a thing of the past. Such a view would disturb settled notions of Federal jurisdiction dating back to *Home Telephone & Telegraph Co.* v. *City of Los Angeles*, 227 U.S. 278 (1913).

Finally, in the wake of *Younger* v. *Harris* 401 U.S. 37 (1971), which forbade Federal judicial interference with pending state criminal proceedings, the current Court has ousted the Federal courts from wide areas of constitutional adjudication in the guise of comity. In *Huffman* v. *Pursue, Ltd.* 420 U.S. 592 (1971), the Court declined to permit a Federal court to enjoin an unconstitutional state civil court injunction. Thus by the simple expedient of commencing a state *civil* proceeding against a potential Federal civil rights plaintiff, state officials can now deprive that plaintiff of access to a Federal court. Moreover, in *Hicks* v. *Miranda*, 422 U.S. 332 (1975), the current Court ruled that even if a Federal plaintiff wins the race to the courthouse and seeks Federal judicial review prior to the initiation of state judicial proceedings against him, the state may nevertheless oust the Federal courts by filing a proceeding even after the Federal action is filed. Such a reverse removal power renders it an act of some courage to seek relief in Federal court since a predictable response under *Hicks* to a § 1983 complaint will be the commencement of state criminal proceedings against the Federal plaintiff.

The net result of expanding the law of standing; narrowing the cause of action granted by the Civil Rights Act of 1871; and pyramiding abstention and comity into a disguised exhaustion requirement, has been the creation of a jurisdictional maze which must be run in order to gain Federal review of Federal constitutional questions—a far cry from the simple, direct and effective remedy intended by Congress in 1871. Unless Congress re-asserts its will, the current Court bids fair to repeal 42 USC § 1983 by judicial fiat.

II. RESTRICTIONS ON ACCESS TO CLASS ACTIONS

In 1966, the Federal Rules of Civil Procedure were amended to authorize individual litigants, whose separate claims might not be sufficient to justify the expense and uncertainty of judicial review, to aggregate their claims into a class action and, by combining into a class, to match the legal resources available to corporations or the government. The class action promised the ability to provide legal redress to thousands of Americans who might otherwise lack the resources or the capacity to protect their rights individually. It also promised the emerging public bar the opportunity to provide legal services to far more persons than had been thought possible in a conventional procedural posture. From the beginning, however, the Supreme Court has narrowly restricted the use of class actions and the current Court has cast serious doubt on class actions as a remedial device. The Supreme Court's attack on class actions began in *Snyder* v. *Harris*, 394 U.S. 332 (1969), when the Court ruled that members of a class could not aggregate their individual damages to satisfy the jurisdictional amount requirements of 28 U.S.C. §§ 1332 and 1331. Since one of the primary purposes of class actions was to permit powerless individuals to aggregate into a powerful, *ad hoc* entity for the purposes of litigating a specific claim, *Snyder* was a serious blow. After *Snyder*, poor persons, whose claims rarely, if ever, exceeded $10,000 individually, were forbidden to aggregate and were, thus, often excluded from Federal court. As bad as *Snyder* was, however, *Zahn* v. *International Paper Company*, 414 U.S. 291 (1973) was even worse. In *Zahn*, the Court ruled that even if the named plaintiff individually satisfied the $10,000 jurisdictional amount, no class action would be permissible unless the members of class each satsified the $10,000 jurisdictional

amount. Thus class actions have now been transformed, through the magic of a hostile Supreme Court into a device for the protection of persons whose claims must each be large enough not to require class actions in the first place. Of course, where a jurisdictional basis other than diversity or Federal question exists, aggregation is unnecessary, since jurisdictional amount is not an issue. Even in such situations, however, the current Court has evinced strong hostility to class actions. In *Eisen* v. *Jacqueline & Carlisle Co.*, ____ U.S. ____ (1975), the current Court required persons wishing to bring a class action for damages to notify each member of the class at his own cost. If, as seems likely the same rules are applied to injunctive or declaratory class actions, only the rich will be able to afford a class action, despite the fact that its purpose was the equalization of litigation resources between rich and poor.

III. RESTRICTIONS ON ATTORNEYS' FEES IN CONSTITUTIONAL CASES

Throughout most of our history, the availability of counsel in constitutional cases has been accidental. The lack of an economic base forced persons seeking to vindicate constitutional rights to rely on volunteer counsel provided by sympathetic attorneys who donated their services to a cause. Much is owed to volunteers such as Clarence Darrow, Osmond Fraenkel, Charles Houston, William Hastie and Arthur Garfield Hays, whose talent unlocked constitutional rights for thousands of impoverished persons. However, reliance on volunteer counsel had its obvious limitations. Availability was sporadic and never came close to meeting the demand for legal services. Accordingly, as the public's perception of the role of law grew closer to Pound's ideal, pressures for a full-time, professionalized public interest bar grew apace. Hundreds of able lawyers, eschewing traditional practice with its monetary rewards, hoped to embark on a career as representatives of the politically powerless. In part, the public bar was subsidized by foundations; in part by cause organizations such as the ACLU and the NAACP. The creation of the OEO Legal Services Corporation was an important step toward institutionalizing the public bar. The most promising source of support for an independent public bar lay, however, not with the foundations; not with cause organizations dependent on voluntary contributions; and not with the government. Rather it lay with the traditional power of a court of equity to award counsel fees to a deserving attorney in a case which benefitted society. Viewing the public bar as private attorneys general, the lower Federal judiciary systematically awarded counsel fees in appropriate cases to lawyers whose efforts had vindicated the rights of the public. While rich awards were by no means automatic and by no stretch of the imagination even close to what could be earned in the private sector, court awarded fees did constitute an important source of financial support for the public bar. In *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 95 S. Ct. 1612 (1975), the current Supreme Court ended the practice of awarding attorneys' fees in constitutional cases. In an ironic abuse of statutory construction, the Court reasoned that since Congress had repeatedly expressly approved the awarding of attorneys' fees in specific contexts, courts lacked the power to award such fees in the absence of express Congressional approval. Following such reasoning to its logical conclusion, when Congress wishes to approve a practice, it should not expressly authorize it, for fear that the Supreme Court will forbid it in all other situations. Whatever the merits of *Alyeska Pipeline*, it struck a sharp blow at the public bar by cutting off its most promising economic base. Given the depths of idealism that motivate the public bar and its proven resiliency, it will doubtless survive—but in a weakened condition.

Coupled with the current Court's assault on the role of the lower Federal judiciary and its unremitting hostility to class actions, its action in *Alyeska* further threatens the ability to enforce the constitutional rights we have won over the past 70 years.

IV. RESTRICTIONS ON REMEDIES

The fourth, and perhaps most disturbing, assault on the lower Federal courts as an effective forum for the protection of constitutional rights involves a series of Supreme Court decisions disabling the Federal courts from providing effective relief—even in those cases where a Federal judge has found that a violation of constitutional law has taken place. Thus, in *Imbler* v. *Pachtman*, — U.S. — (1976), the current Court ruled that a Federal court lacks power to grant compensatory damages to a person who has been the target of malicious and unconstitutional action by a state prosecutor. See also, *Pierson* v. *Ray*, 386 U.S. 547 (1967) (ab-

solute immunity for judges) and *Tenney* v. *Brandhove*, 341 U.S. 367 (1951) (state legislators immune). Similarly, in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), the current Court deprived the lower Federal courts of the power to award damages against a state agency which had unlawfully injured a Federal plaintiff. Earlier decisions had already deprived lower Federal courts of ability to grant damages against municipalities. *Monroe* v. *Pape*, 365 U.S. 167 (1961); *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973).

Thus, when a civil rights plaintiff seeks compensatory damages in a Federal court he is likely to lose—even if he wins on the merits. If the defendant is a judge, a state legislator, a prosecutor, or a local or state governmental agency, current judge-made law deprives a Federal judge of the power to award damages. Moreover, even when such an absolute prohibition on damages is absent, the courts have fashioned a good faith defense which, more often than not, will preclude a damage award. E.g. *Pierson* v. *Ray*, 386 U.S. 547 (1967). It is no exaggeration to characterize the current law of constitutional compensation in the Federal courts as a trap for the unwary.

The current Court has linked its prohibition on damages with an equally drastic assault on the power to grant effective injunctive relief in constitutional cases. In *Rizzo* v. *Goode*, —U.S.—(1976), the current Court stripped the lower Federal courts of the power to fashion flexible equitable decrees to deal with police abuse. In *Rizzo*, a Federal judge, after a scrupulous and painstaking trial which documented twenty instances of unredressed police abuse, ordered responsible city officials to institute a program for the resolution of civilian complaints against the police. The Supreme Court reversed—after chastising the trial judge for exceeding his appropriate role. *Rizzo* merely continued a trend exemplified by *O'Shea* v. *Littleton*, 414 U.S. 488 (1974), in which the current Court reversed a similar imaginative decree aimed at controlling rampant racial discrimination in the administration of justice in Cairo, Illinois. If the current trend continues, Federal judges will soon be stripped of the capacity to fashion meaningful relief to prevent future violations of law. Indeed, it is merely a continuation of this trend which has led the Solicitor General to urge that Federal judges be stripped by the Court of the power to order effective desegregation decrees involving the transportation of pupils.

CONCLUSION

It is, of course, a truism to note that the value of a constitutional right is no greater than the procedures which exist to vindicate it. A constitutional right without a forum to enforce it is meaningless; a constitutional right without a lawyer to enforce it is illusory; and a constitutional right for which no remedy exists is downright dishonest. Yet, the sum and substance of the decisions of the current Supreme Court lead inexorably and dishearteningly to precisely such a dilemma. Indeed, much of the procedural retrenching of the current Court appears to be a kind of guerilla warfare aimed at many of the more controversial substantive decisions of the Warren era. Rather than forthrightly confronting these decisions and seeking to reverse them openly, some members of the current Court appear to have chosen to reverse them covertly by dismantling the apparatus needed for their enforcement. Reasonable persons may agree or disagree with many of the substantive decisions of the Warren Court. If they are to be reversed, however, it should be an open process after full argument; rather than by the cynical and covert emasculation of the Federal courts which has been the disturbing pattern of the current Court. If, as Mr. Justice Frankfurter observed, the history of liberty is inextricably bound up with procedure, the current Supreme Court has seriously endangered our liberties by playing fast and loose with the procedures we have painstakingly erected to protect them. It is time Congress put a stop to such unprincipled and high handed behavior.

We call on this subcommittee to begin the process of examining specific legislative remedies to deal with the obstacles the current Supreme Court has placed in the way of judicial protection of constitutional rights. The American Civil Liberties Union would welcome the opportunity to assist in this process.

Thank you.

[From the Washington Post, May 24, 1976. Reprinted by permission, Chicago Tribune-New York News Syndicate, Inc.]

TOPPIX

"Admit it. You just like to see Aryeh Neier of the ACLU gasp and fling up his hands in horror."

APPENDIX

Los Angeles County Bar Association,
Los Angeles, Calif., May 26, 1976.

Hon. John V. Tunney,
U.S. Senator,
Dirksen Senate Office Building, Washington, D.C.

Dear Senator Tunney: In our judgment, a major and entirely justifiable cause of dissatisfaction with the justice system is the high cost of lawyers' services in contested civil cases, caused in substantial part by the complex procedures that have developed in the name of due process. Such procedures are not infrequently used by one party to "wear down" the other party, a process which is not at all consistent with the interests of justice.

We have attempted in the enclosed bill to develop a pilot program for drastically simplified procedures in small civil cases which could merit the support of all enlightened elements of the bar. To our knowledge, no similar legislation has been adopted in any other state. The bill was recently passed by unanimous vote by the State Assembly.

Sincerely yours,

Francis M. Wheat,
President.

AMENDED IN ASSEMBLY APRIL 29, 1976

CALIFORNIA LEGISLATURE—1975–76 REGULAR SESSION

ASSEMBLY BILL No. 3704

Introduced by Assemblyman Knox

March 15, 1976

REFERRED TO COMMITTEE ON JUDICIARY

An act to add Part 3.5 (commencing with Section 1823) to the Code of Civil Procedure, relating to stipulated procedure in civil cases.

LEGISLATIVE COUNSEL'S DIGEST

AB 3704, as amended, Knox (Jud.). Stipulated civil action procedure.

Existing statutory law recognizes the right of parties to a civil action to stipulate to matters concerning the action. However, there is no specification as to the matters that may be the subject of stipulation.

~~This bill would provide generally that the parties to a civil action, with court approval, may stipulate to limit or modify any existing procedure governing the pleadings, pretrial stage, or trial stage of a civil action.~~

~~This bill would specifically establish three model formats for stipulated procedure in implementation of the general authority to stipulate conferred on the parties by the bill. Under all three model formats (A, B, and C), the provisions applicable to the pleadings and trial stages are alike, while the pretrial and motion phases vary.~~

~~This bill would provide, as respects all three model formats, the following important similarities, among others, with re/~~

~~gard to actions subject thereto:~~

~~(1) Priority over all other civil actions not given priority pursuant to law.~~

~~(2) Trial of all issues in an action by a court and not by a jury.~~

~~(3) Permissible, but not required, use of official briefs.~~

~~(4) Permissible use of written submissions of direct testimony as specified.~~

~~(5) Prohibited use of findings of fact or conclusions of law by the court.~~

~~(6) Permissible use of pleading in the alternative.~~

~~(7) Permissible extensions of time upon agreement of the parties and without court approval, except as specified.~~

~~(8) Prohibited use of discovery.~~

~~This bill would provide, as respects important differences in the three model formats, the following:~~

~~(1) Format B would require each party to file a statement of witnesses, physical evidence, and theories, as specified, which would be held by the court until all parties have filed such statements or the time for such filing has expired, at which time copies would be transmitted to all adverse parties. A party would be limited to calling those witnesses, introducing such physical evidence, and relying on such theories as are disclosed in the statement. Format A would contain no similar provision.~~

~~(2) Format C would require the filing of a statement of the case by each party which would include a statement of the facts, the party's legal contentions, a list of all known witnesses, a summary of the evidence to which each witness may testify, and a list and summary or copies of all documents and physical evidence relevant to the case. Similar to Format B, these statements would be filed with, and distributed to adverse parties by, the court. However, such statements would be subject to supplementation or amendment. Similar to Format B, the calling of witnesses and the introduction of documents and physical evidence would be limited to those witnesses and evidence disclosed in the statement. However, unlike Format B, no provision is made for the award of legal and other expenses to the adverse party for investigation and preparation where the party filing the statement does not use~~

~~the testimony of witnesses or introduce the documents or physical evidence listed in the statement.~~

This bill would require a pilot project to be conducted in four municipal courts, or branches thereof, using ~~Format B~~ *a specified stipulated procedure* in all cases tried therein, exclusive of small claims court cases, except as specified.

This bill would require the Judicial Council to select such municipal courts with the approval of the judge or a majority of the judges of the municipal court district and the board of supervisors of the county in which the judicial district is located.

Under the pilot project all civil actions would be processed and tried in accordance with the stipulated procedure established by the bill except where the case is withdrawn for good cause and in the interest of justice. The provisions of the pilot project applicable to the trial stage are inapplicable to those civil actions in which a jury trial is not waived.

This bill would as respects the pilot project procedures, provide for the following:

(1) The elimination of any requirement of technical forms of a pleading.

(2) Permissible pleading of claims in the alternative or inconsistently.

(3) The prohibition of the use of discovery.

(4) The requirement that each party file a statement of witnesses to be called and physical evidence to be introduced.

(5) The elimination of any requirement of pretrial conferences.

(6) The elimination of the use or permissibility of demurrers or pretrial motions, except as specified.

(7) The permissive, rather than required, use of trial briefs.

(8) The permissive use of narrative testimony.

(9) The permissive use of written submissions of direct testimony.

(10) The admissibility of all relevant evidence other than privileged information, except as privileged information is presently admissible.

(11) The prohibition of the requirement or making of findings of fact or conclusions of law.

This bill would also provide generally that the parties to a

civil action, with court approval, may stipulate to limit or modify any existing procedure governing the pleadings, pretrial stage, or trial stage of a civil action.

Specifically it would authorize the parties to stipulate to the use of one of three alternative stipulated procedures.

Under one of the alternatives all procedures would be those established for the pilot project. Under the other two alternatives the provisions of the pilot project governing pleading and trial would be applicable, but each alternative would making varying provision for pretrial and motion practice.

This bill would require the Judicial Council to ~~do each of the following:~~

~~(1) Conduct a study to indicate the changes in court rules necessitated in implementing the provisions of the bill on a permanent basis.~~

~~(2) Make a report of its findings to the Governor and the Legislature no later than an unspecified date.~~

~~(3) Conduct a 2/year~~ *conduct a* study of the effects of the pilot project and the voluntary use of stipulated procedures by parties generally and report its findings annually to ~~the Governor and~~ the Legislature.

This bill would become operative July 1, 1977.

Vote: majority. Appropriation: no: Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Part 3.5 (commencing with Section 1823) is added to the Code of Civil Procedure, to read:

PART 3.5. OF ALTERNATIVE PROCEDURES

~~TITLE 1. ALTERNATIVE STIPULATED~~

TITLE 1. PILOT PROJECTS

CHAPTER 1. LEGISLATIVE FINDINGS AND DECLARATIONS

1823. The Legislature finds and declares that

experience with civil litigation in California teaches that expense to the litigants has risen so as to deny access to the courts in many instances. All too often a person possessed of a valid claim must forego its enforcement or accept a grossly inadequate out-of-court settlement because the expense of enforcing it in court with procedures as they now exist will exhaust the greater part of his recovery. All too often a person must pay all or part of an unjust claim against him because payment is a lesser financial hardship than the expense of defense in court.

The Legislature further finds and declares that the development of simplified procedures to reduce the expense of litigation is inhibited by the absence from present law of methods for experimentation with procedural innovations to reduce expense. Hence, it has not been possible to adopt the usual management technique of a trial pilot program on a small scale of changed methods of operation with the expectation that experience with the pilot program will permit its permanent adoption in its designed form or with modifications as experience dictates.

The Legislature further finds and declares that there is a compelling state interest in the development of pleading, pretrial, and trial procedures which will reduce the expense of litigation to the litigants and there is likewise a compelling state interest in experimentation on a small scale with new procedures to accomplish that result before those procedures are adopted statewide. The provisions of this part are added to this code to adopt the principle of experimentation in four municipal courts or branches of municipal courts and to permit the parties by stipulation to adopt their own methods of simplifying pleading, pretrial procedure, and trial.

CHAPTER 2. COURTS AND CASES

1823.1. There shall be conducted in four municipal courts, or branches of municipal courts, selected by the Judicial Council with the approval of the judge or a majority of judges of the district and the board of

supervisors of the county in which the judicial district is located a pilot project for a period of three years to achieve a fair sampling of the use of abbreviated procedural requirements.

1823.2. All civil actions, excluding small claims court cases, filed in the courts selected for the pilot project shall be processed and tried in accordance with the procedures set forth in this title except where the court on the motion of a party or its own motion withdraws the case from the simplified procedure for good cause and in the interest of justice.

1823.3. To the extent that rules governing pleading and motion practice, pretrial procedures and trial are not inconsistent with the procedures established in this title, they are applicable to simplified proceedings pursuant to this title.

CHAPTER 3. PLEADINGS

1824. (a) In any action which is governed by the procedures under this title, the pleadings shall consist of a complaint filed by the plaintiff, an answer filed by the defendant, and a cross-claim filed by the defendant at his election.

(b) Motions where permitted by this title shall be in the form generally provided in the Code of Civil Procedure.

1824.1. (a) No technical forms of a pleading are required. Each allegation of a pleading shall be simple, concise, and direct.

(b) A pleading which sets forth a claim for relief, whether as a complaint or cross-claim, shall contain a short and plain statement of the occurrence or transaction upon which it is based showing that the pleader is entitled to relief and a demand for judgment for the relief to which he deems himself entitled. Claims may be pleaded alternatively or inconsistently.

(c) An answer shall state in short and plain terms defenses to each claim asserted and shall admit or deny the allegations upon which the adverse party relies. A

denial may be for lack of information or belief. Affirmative defenses must be affirmatively pleaded in short and plain terms in an answer.

(d) Allegations in a pleading to which a responsive pleading is required are deemed admitted if not denied.

(e) All pleadings shall be construed to do substantial justice. If fraud or mistake is alleged as the basis of a claim or defense, the circumstances of the fraud or mistake shall be stated with particularity.

1824.2. The Judicial Council may adopt and promulgate rules governing the pleading of causes conducted in the pilot project. The rules shall be consistent with this chapter, and unless inconsistent shall control in the proceedings to which they apply.

CHAPTER 4. PRETRIAL AND MOTION PRACTICE

1825. No discovery shall be permitted in any action governed by the procedures in this title.

1825.1. (a) Each party shall file with the court a statement of witnesses and physical evidence within 45 days after the date the case is at issue.

(b) The statement shall include the names and addresses of witnesses the party intends to call and a description of the physical and documentary evidence the party intends to produce with copies of the documents the party intends to rely upon at trial. A party is not required to identify witnesses, physical evidence, or documents which he will use only for impeachment.

1825.2. The court shall hold statements filed with it under seal until it has received the statements of all parties to the action or the time for filing statements has expired. The court then shall contemporaneously transmit copies of the statements to the adverse parties.

1825.3. At trial a party may call as witnesses only those persons disclosed by him and introduce only physical evidence and documents identified in the statement, except where relief is granted for any of the causes specified in Section 473. If relief from a statement is granted, the adverse party shall be entitled to a

continuance to meet the new evidence. Production of evidence for impeachment is not limited.

1825.4. Pretrial conferences are not required; however, counsel should communicate personally or by telephone in an effort to narrow the issues prior to trial or to resolve the disputes.

1825.5. No demurrer or pretrial motion shall be used or permitted in any action governed by the procedures in this title except as follows:

(a) One motion may be made by the defendant to dismiss the action on the ground of a jurisdictional defect or on the ground that the complaint does not give notice of a claim upon which relief can be granted.

(b) Motions may be made for a continuance of the action for good cause.

(c) A motion may be made to withdraw the action from the controls of the procedure under this title for good cause.

(d) One motion may be made by each party for summary judgment or partial summary judgment.

(e) Motions for change of venue.

CHAPTER 5. TRIAL

1826. If possible, the date for trial shall be set within 20 days from the date the court distributes the statement of witnesses and physical evidence in accordance with Section 1825.2.

1826.1. Where a jury is demanded, and the case is tried to a jury, the trial shall not be conducted in accordance with this part, but shall be conducted in accordance with the procedures established in this code other than in this part. Where a jury is waived, the trial shall be conducted as set forth in Section 1826.2 to 1826.14, inclusive.

1826.2. An opening statement to the court by counsel for the parties shall be permitted in the manner and for the duration determined in the discretion of the court.

1826.3. Trial briefs shall be permitted, but shall not be required.

1826.4. The counsel for the parties and the trial judge may interrogate the parties and witnesses. Narrative testimony shall be permitted.

1826.5. The trial judge shall have the discretion to determine the order in which the evidence is introduced and the trial is conducted.

1826.6. Written submissions of direct testimony shall be permitted if the court determines that such submissions will result in a saving of time for the court and counsel.

1826.7. Upon agreement of the parties and with consent of the court, proceedings under this title may be recorded by video tape, electronic recording, or court reporters.

1826.8. No privileged information shall be admissible, except as provided in Division 8 (commencing with Section 900) of the Evidence Code. Subject to the provisions of Section 352 of the Evidence Code, all other evidence relevant to the action shall be admissible. The trial judge shall determine the weight to be accorded any admissible evidence.

1826.9. The trial judge, in his discretion, may permit a pleading to be amended to conform to proof.

1826.10. Closing arguments by counsel shall be permitted in the manner and for the duration determined in the discretion of the court.

1826.11. Findings of fact or conclusions of law shall not be required or made in any action tried pursuant to this title. Upon request of any party to the action, the court shall issue a brief explanation of its decision either orally or in writing.

1826.12. Any motion which may be made after trial in the court pursuant to law may be made in any action tried pursuant to this title.

1826.13. The effect of a judgment or final order in any action tried pursuant to the provisions of this title, in respect to the matter or matters directly adjudged, is conclusive between the parties and their successors in interest but shall not operate as collateral estoppel of a party in other litigation with a person who was not a party

to the action in which the judgment or order is rendered.

1826.14. Any party shall have the right to appeal any judgment or final order pertaining to an action governed by this title consistent with the law governing such appeals.

TITLE 2. ALTERNATIVE STIPULATED PROCEDURES

CHAPTER 1. STIPULATIONS OF PARTIES

1827. The parties to any civil action may, with the approval of the court, stipulate to limit or modify any existing procedure governing the pleading, proceedings before trial, or trial of the action.

1827.1. Any court or judge may develop forms of stipulations modifying existing procedures to be used, modified or rejected by parties as they see fit.

CHAPTER 2. STATUTORY FORMS OF STIPULATED PROCEDURE

1828. The procedures set forth in this chapter are applicable to any action in any superior, municipal, or justice court other than a municipal court in which a pilot project is under way pursuant to Section 1823 when adopted by all the parties appearing in the action by stipulation. Where they are utilized by stipulation, the judgment or final order in the action is conclusive between the parties and their successors in interest as to matters directly adjudged or determined, but shall not operate as a collateral estoppel of a party in other litigation with a person not a party to the action in which the judgment or order is rendered.

1828.1. The parties to any civil action may stipulate to the use of the procedures set forth in Section 1829, Section 1830, or Section 1831. Nothing in this section precludes the parties from other forms of stipulation pursuant to Section 1827.

1829. (a) When the parties to any civil action

stipulate to the use of the procedures in this section, the procedure of pleading and trial shall be as set forth in Sections 1824 to 1824.2, inclusive, and Sections 1826 to 1826.14, inclusive. Cases in which the stipulation is entered shall be entitled to priority in trial over all actions not otherwise entitled to priority.

(b) No discovery shall be permitted. No demurrer or pretrial motions shall be permitted except: (1) one motion may be made by the defendant to dismiss the action on the grounds of a jurisdictional defect or that the complaint does not give notice of a claim upon which relief can be granted; (2) motions for continuance for good cause; and (3) motions to withdraw the action from the stipulated procedure upon a showing of good cause.

1830. When the parties to any civil action stipulate to the use of the procedures in this section, the procedure of pleading, pretrial, and trial, shall be that set forth in Sections 1824 to 1826.14, inclusive. Cases in which the stipulation is entered shall be entitled to priority in trial over all actions not otherwise entitled to priority.

1831. (a) When the parties to any civil action stipulate to the use of the procedures in this section, the procedure of pleading and trial shall be as set forth in Sections 1824 to 1824.2, inclusive, and 1826 to 1826.14, inclusive. Cases in which the stipulation is entered shall be entitled to priority over all actions not otherwise entitled to priority.

(b) No discovery shall be permitted.

(c) In lieu of discovery:

(1) Each party shall file with the court a statement of the case within 45 days from the date the case is at issue.

(2) Subject to the rules of privileged information, as set forth in Division 8 (commencing with Section 900) of the Evidence Code, the statement of the case shall include each of the following:

(i) A statement of the facts.

(ii) A statement of the party's legal contentions, including brief citations to relevant and pertinent case law and statutory law.

(iii) A written statement of the evidence to which

each witness which the party intends to call may testify, together with a list under oath in the manner prescribed in Section 2030 for answering interrogatories of the following:

(A) A list of all known persons with knowledge of the facts of the controversy, favorable and unfavorable, including addresses and telephone numbers, if known.

(B) A list of all documents and physical evidence relevant to the case and copies of the documents.

(iv) A statement of the case shall constitute an admission, but shall be deemed denied by the adverse parties.

(v) The court shall hold statements of the case filed with it under seal until it has received statements from all parties to the action or the time for filing statements has expired. If any party has not filed a statement, the clerk shall give notice in writing that unless a statement is filed within 10 days the party's pleading shall be stricken. If a statement is not filed within the 10-day period, the court shall strike the pleadings of the party in default. The court then shall contemporaneously transmit copies of the statements to the adverse parties.

(vi) If a party deems that a statement of the case filed by an adverse party is unclear, uncertain, or ambiguous, he may, by written demand, specify the deficiencies in the statement and demand that the party that filed the statement clarify the statement by a supplement to be served and filed within 20 days of the notice. If the adverse party does not adequately respond to the demand, the party serving the notice may, within 20 days after response is received or upon lapse of time within which the response may be made, make a motion requesting the court to order such clarification.

(vii) A party may supplement or amend his statement of the case (A) by stipulation of the parties, or (B) by motion at the time of trial upon a showing of good cause as specified in Section 473, a showing of lack of prejudice to adverse parties, and a showing that the substance of the supplement or amendment was communicated to adverse parties by formal written notice at the earliest

reasonable time. The trial court may grant a continuance to the adverse party where it permits a supplement or amendment to the statement of the case.

(viii) Except as the court may permit in the interest of justice and upon such conditions as are necessary to protect the rights of adverse parties, only persons identified in the statement of the case may be called as witnesses by the party filing the statement, and only physical evidence and documents described in the statement may be introduced.

(d) Pretrial conferences are not required; however, counsel should communicate personally or by telephone in an effort to narrow the issues prior to trial or to resolve the dispute.

(e) No demurrer or pretrial motion shall be used or permitted in any action governed by these procedures except:

(1) A motion may be made by the defendant to dismiss the action on the ground of a jurisdictional defect or that the complaint does not state a claim.

(2) Motions may be made for a continuance of the action for good cause.

(3) Motion may be made to withdraw the action from the controls of the stipulated procedure under this title for good cause.

(4) One motion may be made by any party for judgment on the ground that the pleadings, as supplemented by admissions in the statements of the case, entitle such party to a judgment.

(5) One motion may be made by each party for summary judgment or for partial summary judgment.

(6) A motion to clarify the statement of the case.

1832. The Judicial Council may devise and promulgate forms to facilitate the use of the alternative forms of stipulated procedure designated in Sections 1829, 1830, and 1831.

TITLE 3. JUDICIAL COUNCIL STUDY AND OPERATIVE DATE

1833. The Judicial Council shall conduct a study of the effects of the pilot project established in Title 1 (commencing with Section 1823) of this part and the voluntary use of the stipulated procedures permitted by Title 2 (commencing with Section 1827) of this part and shall make an annual report of its findings to the Legislature.

1833.1. The provisions of Title 1 (commencing with Section 1823) of this part and of Section 1833 shall be implemented by the Judicial Council only when and to the extent that funds are made available to implement the pilot project set forth in Title 1 (commencing with Section 1823) of this part and the study set forth in Section 1833.

1833.2. The provisions of this part shall become operative on July 1, 1977.

~~PROCEDURE~~

~~CHAPTER 1. GENERAL PROVISIONS~~

~~1822. The parties to a civil action, with approval of the court, may stipulate to limit or modify any existing procedure governing the pleadings, pretrial stage, or trial stage of such civil action.~~

~~1822.1. The procedural requirements set forth in Title 2 (commencing with Section 1825), Title 3 (commencing with Section 1828), and Title 4 (commencing with Section 1831) are intended as models for individually developed stipulated procedures in civil actions as permitted by Section 1822.~~

~~1822.2. The Judicial Council shall have the power to devise and promulgate forms for statements of the case as required in Sections 1829.1 and 1832.2 to be used in common categories of litigation.~~

~~1822.3. The Judicial Council shall conduct a study to indicate the changes in court rules which shall be~~

~~required to implement the provisions contained in Title 1 (commencing with Section 1823), Title 2 (commencing with Section 1825), Title 3 (commencing with Section 1828), and Title 4 (commencing with Section 1831) on a permanent basis and to make a report of its findings to the Governor and to the Legislature no later than ////.~~

~~1823.4. The Judicial Council shall conduct a two/year study of the effects of the pilot project established in Chapter 2 (commencing with Section 1824) and the voluntary use of stipulated procedures permitted by Section 1823 and shall make an annual report of its findings to the Governor and to the Legislature.~~

~~CHAPTER 2. PILOT PROJECT~~

~~1824. There shall be conducted in four municipal courts, or branches of municipal courts, selected by the Judicial Council with the approval of the judge or a majority of judges of the district and the board of supervisors of the county in which the judicial district is located, a two/year pilot project to achieve a fair sampling of the use of abbreviated procedural requirements in divergent demographic and financial constituencies.~~

~~1824.1. All civil actions, excluding small claims court cases, filed in the courts selected for the pilot project shall be processed and tried in accordance with the procedures, as to pleadings and the pretrial and trial stages of such cases, set forth in Title 3 (commencing with Section 1828), except as follows:~~

~~(a) Cases shall be withdrawn from the simplified procedure format where there is a timely demand for jury trial by any party.~~

~~(b) The court may withdraw a case from the simplified procedure format on its own motion in the interests of justice.~~

~~1824.2. Notwithstanding any provision in Title 3 (commencing with Section 1828) a party in a case in a court selected for the pilot project may make a motion for a change of venue.~~

~~TITLE 2. ALTERNATIVE STIPULATED PROCEDURE / FORMAT A~~

~~CHAPTER 1. PLEADINGS~~

~~1825. (a) In any action which is governed by the procedures under this title, there shall be a complaint and an answer, a reply to a counterclaim denominated as such, and an answer to a cross/claim, if the answer contains a cross/claim. No other pleading shall be allowed, except that the court may order a reply to an answer.~~

~~(b) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of a writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.~~

~~1825.1. (a) A pleading which sets forth a claim for relief, whether an original claim, counterclaim, or cross/claim, shall contain a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.~~

~~(b) A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this shall have the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all~~

~~the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligation set forth in Section 1831.1.~~

~~(c) In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.~~

~~(d) Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.~~

~~(e) (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.~~

~~(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds. All statements shall be made subject to the obligations set forth in Section 1831.1.~~

~~(f) All pleadings shall be so construed as to do~~

~~substantial justice.~~

~~1825.2. (a) It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.~~

~~(b) In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.~~

~~(c) In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.~~

~~(d) In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.~~

~~(e) In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.~~

~~(f) For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.~~

~~(g) When items of special damage are claimed, they shall be specifically stated.~~

~~1825.3. (a) Every pleading and motion shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in~~

~~subdivision (a) of Section 1831. In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.~~

~~(b) All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.~~

~~(c) Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.~~

~~1825.1. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Pleadings shall be verified in the manner set forth in Section 446. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.~~

~~1825.5. (a) A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, except when a different time is prescribed in an order of the court. A party served with a pleading~~

~~stating a cross/claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The service of a motion permitted under this title alters these periods to time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.~~

~~(b) Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross/claim, or third/party claim, shall be asserted in the responsive pleading thereto if one is required. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief.~~

~~1825.6. (a) A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this section.~~

~~(b) A pleading may state as a counterclaim any claim~~

against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(e) When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(f) A pleading may state as a cross/claim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross/claim may include a claim that the party against whom it is asserted is or may be liable to the cross/claimant for all or part of a claim asserted in the action against the cross/claimant.

1825.7. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only with permission of the court or by written consent of the adverse party; and permission shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

1825.8. Extensions of time are permissible upon agreement of the parties without court approval until the

~~lapse of three years after which the action may be dismissed on the court's own motion.~~

~~CHAPTER 2. PRETRIAL AND MOTION PRACTICE~~

~~1826. No discovery shall be permitted in any action governed by the procedure in this title.~~

~~1826.1. No demurrer or pretrial motion shall be used or permitted in any action governed by the procedure in this title, except as follows:~~

~~(a) One motion may be made by the defendant to dismiss the action on the ground of a jurisdictional defect or on the ground that the complaint does not give notice of a claim upon which relief can be granted.~~

~~(b) Motions may be made for a continuance of the action for good cause.~~

~~(c) Motions may be made to withdraw the action from the controls of the stipulated procedure under this title for good cause.~~

~~CHAPTER 3. TRIAL~~

~~1827. The court shall give an action which is governed by the procedure in this title priority over all the other civil actions which are not given priority pursuant to law.~~

~~1827.1. Issues of an action governed by the procedure in this title shall be tried by the court and not by a jury.~~

~~1827.2. An opening statement to the court by counsel for the parties shall be permitted in the manner and for the duration determined in the discretion of the court.~~

~~1827.3. Trial briefs shall be permitted, but are not required.~~

~~1827.4. The counsel for the parties and the trial judge may interrogate the parties and witnesses. Narrative testimony shall be permitted.~~

~~1827.5. The trial judge shall have the discretion to determine the order in which the evidence is permitted and the trial is conducted.~~

~~1827.6. Written submissions of direct testimony shall be permitted if the court determines that such~~

~~submissions will result in a saving of time for the court and counsel.~~

~~1827.7. Upon agreement of the parties and with consent of the court, proceedings under this title may be recorded by video tape, electronic recording, or court reporters.~~

~~1827.8. No privileged information shall be admissible, except as provided in Division 8 (commencing with Section 900) of the Evidence Code. All other evidence relevant to the action shall be admissible. The trial judge shall determine the weight to be accorded any admissible evidence.~~

~~1827.9. The trial judge, in his discretion, may permit a pleading to be amended to conform to the proof.~~

~~1827.10. Closing arguments by counsel shall be permitted in the manner and for the duration determined in the discretion of the court.~~

~~1827.11. Findings of fact or conclusions of law shall not be required or made in any action tried pursuant to this title. Upon request of any party to the action, the court shall issue a brief explanation of its decision either orally or in writing.~~

~~1827.12. Any posttrial motion which may be made in the particular court pursuant to law may be made in any action tried pursuant to this title.~~

~~1827.13. The effect of a judgment or final order in any action tried pursuant to the provisions of this title, in respect to the matter or matters directly adjudged, is conclusive between the parties and their successors in interest. In any succeeding action between the same parties on a different cause of action, such judgment shall not operate as an estoppel or conclusive adjudication as to any issue in such succeeding action.~~

~~1827.14. Any party shall have the right to appeal any judgment or final order pertaining to an action governed by this title consistent with the law governing such appeals.~~

TITLE 3. ALTERNATIVE STIPULATED PROCEDURE / FORMAT B

CHAPTER 1. PLEADINGS

1828. (a) In any action which is governed by the procedures under this title, there shall be a complaint and an answer; a reply to a counterclaim denominated as such; and an answer to a cross/claim, if the answer contains a cross/claim. No other pleading shall be allowed, except that the court may order a reply to an answer.

(b) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of a writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

1828.1. (a) A pleading which sets forth a claim for relief, whether an original claim, counterclaim, or cross/claim, shall contain a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this shall have the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all

~~the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligation set forth in Section 1828.1.~~

~~(c) In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.~~

~~(d) Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.~~

~~(e) (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.~~

~~(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds. All statements shall be made subject to the obligations set forth in Section 1828.1.~~

~~(f) All pleadings shall be so construed as to do~~

substantial justice.

1828.2. (a) It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) When items of special damage are claimed, they shall be specifically stated.

1828.3. (a) Every pleading and motion shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in

~~subdivision (a) of Section 1828. In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.~~

~~(b) All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances, and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.~~

~~(c) Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.~~

~~1828.1. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Pleadings shall be verified in the manner set forth in Section 446. The signature of an attorney constitutes a certificate by him that he has read the pleading, that to the best of his knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.~~

~~1828.5. (a) A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, except when a different time is prescribed in an order of the court. A party served with a pleading~~

~~stating a cross/claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The service of a motion permitted under this title alters these periods to time as follows, unless a different time is fixed by order of the court. (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.~~

~~(b) Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross/claim, or third/party claim, shall be asserted in the responsive pleading thereto if one is required. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief.~~

~~1828.6. (a) A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this section.~~

~~(b) A pleading may state as a counterclaim any claim~~

~~against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.~~

~~(c) A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.~~

~~(d) A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.~~

~~(e) When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.~~

~~(f) A pleading may state as a cross/claim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross/claim may include a claim that the party against whom it is asserted is or may be liable to the cross/claimant for all or part of a claim asserted in the action against the cross/claimant.~~

~~1828.7. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only with permission of the court or by written consent of the adverse party; and permission shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.~~

~~1828.8. Extensions of time are permissible upon agreement of the parties without court approval until the~~

~~lapse of three years after which the action may be dismissed on the court's own motion.~~

~~CHAPTER 2. PRETRIAL AND MOTION PRACTICE~~

~~1829. No discovery shall be permitted in any action governed by the procedures in this title.~~

~~1829.1. (a) Each party shall file with the court a statement of witnesses, physical evidence, and theories within 45 days after the date the case is at issue.~~

~~(b) The statement shall include the names and addresses of witnesses the party intends to call, a description of the physical and documentary evidence the party intends to produce with the copies of the documents, and the theories the party intends to rely upon at trial. The statement shall also include identification of witnesses and physical and documentary evidence which the party may use at trial upon the happenings of a contingency with a statement of the contingency, except that a party is not required to identify witnesses, physical evidence, or documents which he will use only for impeachment.~~

~~1829.2. The court shall hold statements filed with it under seal until it has received the statements of all parties to the action or the time for filing statements has expired. The court then shall contemporaneously transmit copies of the statements to the adverse parties.~~

~~1829.3. At trial a party may call as witnesses only those persons disclosed by him, introduce only physical evidence and documents identified in the statement, and rely only upon his disclosed legal theories, except for any of the causes specified in Section 657. If relief from a statement is granted, the adverse party shall be entitled to a continuance to meet the new evidence or theory. Production of evidence for impeachment is not limited.~~

~~1829.4. In the event a party lists witnesses, physical evidence, or documents in his statement and does not use the testimony at trial, the court shall, if the witnesses, physical evidence, or documents are stated without contingency or if the contingency was stated and the~~

~~contingency occurred, award to the adverse party or parties their legal and other expense required to investigate and prepare to meet the evidence listed, but not used.~~

~~1829.5. Pretrial conferences are not required, however, counsel should communicate personally or by telephone in an effort to narrow the issues prior to trial or to resolve the disputes.~~

~~1829.6. No demurrer or pretrial motion shall be used or permitted in any action governed by the procedures in this title except as follows:~~

~~(a) One motion may be made by the defendant to dismiss the action on the ground of a jurisdictional defect or on the ground that the complaint does not give notice of a claim upon which relief can be granted.~~

~~(b) Motions may be made for a continuance of the action for good cause.~~

~~(c) A motion may be made to withdraw the action from the controls of the stipulated procedure under this title for good cause.~~

~~(d) One motion may be made by each party for summary judgment or partial summary judgment.~~

~~CHAPTER 3. TRIAL~~

~~1830. The court shall give an action which is governed by the procedure in this title priority over the other civil actions which are not given priority pursuant to law. If possible, the date for trial shall be set within 20 days from the date the court distributes the statement of witnesses, physical evidence, and theories in accordance with Section 1829.2.~~

~~1830.1. Issues of an action governed by the procedure in this title shall be tried by the court and not by a jury.~~

~~1830.2. An opening statement to the court by counsel for the parties shall be permitted in the manner and for the duration determined in the discretion of the court.~~

~~1830.3. Trial briefs shall be permitted, but are not required.~~

~~1830.4. The counsel for the parties and the trial judge~~

~~may interrogate the parties and witnesses. Narrative testimony shall be permitted.~~

~~1830.5. The trial judge shall have the discretion to determine the order in which the evidence is permitted and the trial is conducted.~~

~~1830.6. Written submissions of direct testimony shall be permitted if the court determines that such submissions will result in a saving of time for the court and counsel.~~

~~1830.7. Upon agreement of the parties and with consent of the court, proceedings under this title may be recorded by video tape, electronic recording, or court reporters.~~

~~1830.8. No privileged information shall be admissible, except as provided in Division 8 (commencing with Section 900) of the Evidence Code. All other evidence relevant to the action shall be admissible. The trial judge shall determine the weight to be accorded any admissible evidence.~~

~~1830.9. The trial judge, in his discretion, may permit a pleading to be amended to conform to the proof.~~

~~1830.10. Closing arguments by counsel shall be permitted in the manner and for the duration determined in the discretion of the court.~~

~~1830.11. Findings of fact or conclusions of law shall not be required or made in any action tried pursuant to this title. Upon request of any party to the action, the court shall issue a brief explanation of its decision either orally or in writing.~~

~~1830.12. Any posttrial motion which may be made in the particular court pursuant to law may be made in any action tried pursuant to this title.~~

~~1830.13. The effect of a judgment or final order in any action tried pursuant to the provisions of this title, in respect to the matter or matters directly adjudged, is conclusive between the parties and their successors in interest. In any succeeding action between the same parties on a different cause of action, such judgment shall not operate as an estoppel or conclusive adjudication as to any issue in such succeeding action.~~

~~1830.14. Any party shall have the right to appeal any judgment or final order pertaining to an action governed by this title consistent with the law governing such appeals.~~

~~TITLE 4. ALTERNATIVE STIPULATED PROCEDURE / FORMAT C~~

~~CHAPTER 1. PLEADINGS~~

~~1831. (a) In any action which is governed by the procedures under this title, there shall be a complaint and an answer; a reply to a counterclaim denominated as such; and an answer to a cross/claim, if the answer contains a cross/claim. No other pleading shall be allowed, except that the court may order a reply to an answer.~~

~~(b) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of a writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.~~

~~1831.1. (a) A pleading which sets forth a claim for relief, whether an original claim, counterclaim, or cross/claim, shall contain a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.~~

~~(b) A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this shall have the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of~~

~~it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligation set forth in Section 1831.1.~~

~~(c) In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.~~

~~(d) Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.~~

~~(e) (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.~~

~~(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate~~

~~claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds. All statements shall be made subject to the obligations set forth in Section 1831.1.~~

~~(f) All pleadings shall be so construed as to do substantial justice.~~

~~1831.2. (a) It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.~~

~~(b) In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.~~

~~(c) In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.~~

~~(d) In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.~~

~~(e) In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.~~

~~(f) For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.~~

~~(g) When items of special damage are claimed, they shall be specifically stated.~~

~~1831.3. (a) Every pleading and motion shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in subdivision (a) of Section 1831. In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.~~

~~(b) All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances, and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.~~

~~(c) Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.~~

~~1831.1. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Pleadings shall be verified in the manner set forth in Section 446. The signature of an attorney constitutes a certificate by him that he has read the pleading, that to the best of his knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent~~

~~matter is inserted.~~

~~1831.5. (a) A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, except when a different time is prescribed in an order of the court. A party served with a pleading stating a cross/claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The service of a motion permitted under this title alters these periods to time as follows, unless a different time is fixed by order of the court. (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.~~

~~(b) Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross/claim, or third/party claim, shall be asserted in the responsive pleading thereto if one is required. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief.~~

~~1831.6. (a) A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit~~

~~upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this section.~~

~~(b) A pleading may state as a counterclaim any claim against an opposing party, not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.~~

~~(c) A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.~~

~~(d) A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.~~

~~(e) When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.~~

~~(f) A pleading may state as a cross/claim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross/claim may include a claim that the party against whom it is asserted is or may be liable to the cross/claimant for all or part of a claim asserted in the action against the cross/claimant.~~

~~1831.7. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only with permission of the court or by written consent of the adverse party, and permission shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading~~

~~or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.~~

~~1831.8. Extensions of time are permissible upon agreement of the parties without court approval until the lapse of three years after which the action may be dismissed on the court's own motion.~~

~~CHAPTER 2. PRETRIAL AND MOTION PRACTICE~~

~~1832. No discovery shall be permitted in any action governed by the procedure in this title.~~

~~1832.1. Each party shall file with the court a statement of the case, as set forth in Section 1832.2, within 15 days from the date the case is at issue.~~

~~1832.2. Subject to the rules of privileged information, as set forth in Division 8 (commencing with Section 900) of the Evidence Code, the statement of the case shall include each of the following:~~

~~(a) A statement of the facts.~~

~~(b) A statement of the party's legal contentions, including relevant and pertinent citations to case law and statutory law.~~

~~(c) A list of all known witnesses, favorable and unfavorable, including addresses and telephone numbers, if known.~~

~~(d) A summary of the evidence to which each witness may testify.~~

~~(e) A list and summary of all documents and physical evidence relevant to the case or copies of those documents and physical evidence.~~

~~1832.3. A statement of the case shall constitute an admission, but shall be deemed denied by the adverse parties.~~

~~1832.4. The court shall hold statements of the case filed with it under seal until it has received statements from all the parties to the action or the time for filing statements has expired. The court then shall contemporaneously transmit copies of the statements to the adverse parties.~~

~~1832.5. If a party deems that a statement of the case filed by an adverse party is unclear, uncertain, or ambiguous, he may, by written motion, specifying the deficiencies in the statement, seek to have the party which filed the statement clarify the statement by a supplement to be served and filed within 20 days of the notice. If the adverse party does not adequately respond to the demand, the party serving the notice may, within 20 days after response is due, make a motion for such clarification.~~

~~1832.6. A statement of the case may be supplemented or amended (a) by stipulation of the parties, or (b) by motion at the time of trial upon a showing of good cause as specified in Section 657, a showing of lack of prejudice to adverse parties, and a showing that the substance of the supplement or amendment was communicated to adverse parties by formal written notice at the earliest possible time. The trial court may grant a continuance to the adverse party where it permits a supplement or amendment to the statement of the case.~~

~~1832.7. At trial, only persons identified in the statement of the case may be called as witnesses by the party filing the statement, and only physical evidence and documents described in the statement may be introduced, subject to the right of a party to amend or supplement a statement at trial.~~

~~1832.8. Pretrial conferences are not required, however, counsel should communicate personally or by telephone in an effort to narrow the issues prior to trial or to resolve the dispute.~~

~~1832.9. No demurrer or pretrial motion shall be used or permitted in any action governed by the procedures in this title, except as follows:~~

~~(a) One motion may be made by the defendant to dismiss the action on the ground of a jurisdictional defect.~~

~~(b) Motions may be made for a continuance of the action for good cause.~~

~~(c) Motion may be made to withdraw the action from the controls of the stipulated procedure under this title for good cause.~~

~~(d) One motion may be made by any party for judgment on the ground that the pleadings, as supplemented by the admission in the statements of the case entitle such party to a judgment.~~

~~(e) One motion may be made by each party for summary judgment or for partial summary judgment.~~

~~(f) One motion may be made by each party to have an adverse party's statement of the case clarified pursuant to Section 1832.5.~~

~~CHAPTER 3. TRIAL~~

~~1833. The court shall give an action which is governed by the procedure in this title priority over all the other civil actions which are not given priority pursuant to law.~~

~~1833.1. Issues of an action governed by the procedure in this title shall be tried by the court and not by a jury.~~

~~1833.2. An opening statement to the court by counsel for the parties shall be permitted in the manner and for the duration determined in the discretion of the court.~~

~~1833.3. Trial briefs shall be permitted, but are not required.~~

~~1833.4. The counsel for the parties and the trial judge may interrogate the parties and witnesses. Narrative testimony shall be permitted.~~

~~1833.5. The trial judge shall have the discretion to determine the order in which the evidence is permitted and the trial is conducted.~~

~~1833.6. Written submissions of direct testimony shall be permitted if the court determines that such submissions will result in a saving of time for the court and counsel.~~

~~1833.7. Upon agreement of the parties and with consent of the court, proceedings under this title may be recorded by video tape, electronic recording, or court reporters.~~

~~1833.8. No privileged information shall be admissible, except as provided in Division 8 (commencing with Section 900) of the Evidence Code. All other evidence relevant to the action shall be admissible. The trial judge~~

~~shall determine the weight to be accorded any admissible evidence.~~

~~1833.9. The trial judge, in his discretion, may permit a pleading to be amended to conform to the proof.~~

~~1833.10. Closing arguments by counsel shall be permitted in the manner and for the duration determined in the discretion of the court.~~

~~1833.11. Findings of fact or conclusions of law shall not be required or made in any action tried pursuant to this title. Upon request of any party to the action, the court shall issue a brief explanation of its decision either orally or in writing.~~

~~1833.12. Any posttrial motion which may be made in the particular court pursuant to law may be made in any action tried pursuant to this title.~~

~~1833.13. The effect of a judgment or final order in any action tried pursuant to the provisions of this title, in respect to the matter or matters directly adjudged, is conclusive between the parties and their successors in interest. In any succeeding action between the same parties on a different cause of action, such judgment shall not operate as an estoppel or conclusive adjudication as to any issue in such succeeding action.~~

~~1833.14. Any party shall have the right to appeal any judgment or final order pertaining to an action governed by this title consistent with the law governing such appeals.~~

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Cutting Access to the Courts

(By Mark G. Yudof [1])

Every first year law student learns, or should learn, that abstract legal rights are meaningless unless there are adequate remedies for the violation of those rights. For example, if a person has a "right" to property, government must be willing to protect the peaceful possession of that property, to compensate for trespass, and to deter those who would take it away by force or guile.

This truism of the law has particular meaning for prized constitutional freedoms. Many speak casually of the "right" to free speech or association, the "right" to due process of law, or the "right" to freedom of the press. But these are simply empty phrases unless courts act forcefully to protect the interests which they embody.

This elementary lesson, unfortunately, has not been learned by the majority of the United States Supreme Court. Increasingly, the Burger court, under a variety of pretexts, has been limiting access to the federal courts for the redress of constitutional rights and denying remedies even where constitutional violations are apparent or even akcnowledged. These decisions do not rest on the need to define the scope of particular rights. Interpretation of vague constitutional language is an inevitable part of the judging process.

Rather litigants are informed that the court lacks jurisdiction over the case, that local and state governments cannot be compelled to pay for thier wrongs, that Supreme Court orders jeopardize sensitive federal-state relations, or that the matter is better decided by state courts—many of which are unsympathetic to the rights asserted. The result is a systematic undermining of constitutional principles. And, by utilizing the technicalities of the law of federal courts, public and media understanding of what is happening is diminished and attention diverted to the seemingly more important substantive decisions.

Perhaps the best example of this new philosophy of closing the doors to the federal courts is *Rizzo v. Goode*, a recent decision of the Supreme Court written by Mr. Justice Rehnquist. In that case, the plaintiffs alleged and proved a number of instances of police brutality toward minority group citizens on Philadelphia, and yet the court, in a 5–3 decision, refused to respond.

It overruled a cautious lower court order calling for the police department itself to set up procedures to deal with citizen complaints. In doing so, it did not deny the existence of constitutional wrongs. Rather the high court wrapped itself in the robes of federalism and invoked a litany of democratic phrases. The message: federal courts should not interfere with the internal workings of government agencies.

To be sure, federal judges, who are not directly accountable to the people, must be sensitive to such concerns. But where violations of constitutional rights have been demonstrated, they offer no justification for judicial inaction.

The great judicial conservatives of the past, Justices Frankfurter and Harlan, countenanced no such philosophy. They fought for a less expansive view of constitutional doctrines and for greater recognition of the limited institutional role of federal courts. But theirs was not a philosophy of denying access to the federal forum, not did they hesitate to grant redress where plaintiffs proved to their satisfaction that established constitutional norms had been breached.

The time has come for the Congress to send a message to the Supreme Court. Most of the access and remedy-denying decisions involve ingenious, if insensitive, interpretations of federal statutes regulating the court's jurisdiction and creating causes of actions to vindicate constitutional rights.

Congress must alter these laws to make clear a simple point: the federal courts are obliged to open their doors to claims based upon federal constitutional provisions and to grant relief where rights have been compromised. Perhaps, under such circumstances, many of the justices will live up to their reputations as "strict constructionists."

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[1] Mark G. Yudof is Professor of Law at the University of Texas at Austin.

April 7, 1976.

To: Participants in the "Pound Revisited" Conference.

From: Aryeh Neier, executive director, American Civil Liberties Union, Melvin L. Wulf, legal director, American Civil Liberties Union, Rhoda H. Karpatkin, executive director, Consumers Union, Arlie Schardt, executive director, Environmental Defense Fund, Paul Friedman, managing attorney, Mental Health Law Project, Lennox S. Hinds, director, National Conference of Black Lawyers, Sidney M. Wolinsky, managing attorney, Public Advocates, Alan Morrison, litigation director, Public Citizen, Oscar Garcia Rivera, executive director, Puerto Rican Legal Defense and Education Fund, Stephen Gillers, executive director, Society of American Law Teachers. (Organizations listed for identification purposes only.)

You are meeting to honor the seventieth anniversary of Roscoe Pound's address to the American Bar Association on the causes of popular dissatisfaction with the administration of justice. We hope that the conference will include discussion of the issues presented by a series of Supreme Court decisions during the past few years which have radically reduced the ability of the lower federal courts to exercise their responsibility under the Constitution to enforce the Bill of Rights.

Since the adoption of the Civil War amendments, the federal courts have been the first resort of those who needed and sought the protection of the Constitution. Particularly where the rights of racial minorities were concerned, the state courts in the North as well as in the South refused to enforce the prohibitions against racial discrimination embodied in the 13th, 14th and 15th amendments. The Supreme Court itself betrayed the purpose of those amendments in 1896 in *Plessy* v. *Ferguson* by construing the equal protection clause to include the racist concept of separate but equal. That decision set back egalitarian principles by a half century until *Brown* v. *Board of Education* in 1954.

More than a generation ago the federal courts began tentatively experimenting with their role under the Supremacy Clause in non-racial constitutional areas. To note but two major examples, in *Hague* v. *Congress of Industrial Organizations* in 1939, the Supreme Court held that the federal courts had the power and duty to provide citizens with effective protection under the First Amendment against encroachment by state and municipal officers; and in *Monroe* v. *Pape*, in 1961, the Court construed the Civil Rights Act of 1871 to require federal courts to provide meaningful remedies for injuries inflicted by state and local police officers in violation of constitutional standards.

These decisions and others were the foundation for expansive utilization during recent decades of the federal courts as the primary guardians of the personal rights guaranteed by the Bill of Rights. It was, in our opinion, the beginning of the fulfillment of the promises held out by the Constitution to all of the people of the United States.

During the past few years, however, that promise has been thwarted by the Supreme Court in a series of decisions whose effect is to restrict substantially the right to secure meaningful protection in the federal courts against the invasion of constitutional rights by the states and their officers. If the trend continues—indeed, if it is not reversed—we believe that the protection of constitutional rights and liberties will be imperiled, and the people will be unable to defend themselves against arbitrary and unconstitutional actions of state officials or to secure effective relief against invalid state laws.

Hicks v. *Miranda*, 422 U.S. 332 (1975), is among the most significant of those harmful decisions. *Hicks* concluded a series of cases involving the availabilty of federal court review of state statutes and official actions said to be unconstitutional. Though the power of federal court review was cut off entirely in *Younger* v. *Harris* where a state prosecution is pending, even in face of a First Amendment claim, *Steffel* v. *Thompson* salvaged some of the power of review, as long as the plaintiff was able to show a credible threat of presecution so that he or she had requisite standing. But *Hicks* armed the states with an automatic weapon which allows termination of federal court power of review by the mere filing by the state of a criminal action against the plaintiff in the federal action. [1] The result is that in those cases the federal constitutional issue is decided by the state courts rather than by the federal courts. Though the Supreme Court can review the state court decision, the prospects for plenary review are statically not very encouraging. Because of the historic lack of state court sympathy to federal constitutional claims which exists in many states to this day, the federal courts must be available for review of federal constitutional claims.

[1] We are aware, of course, of the "proceedings of substance" limitation. It is a limitation that is easily avoided.

Rizzo v. *Goode*, decided this term, galvanized our view that the Supreme Court is embarked on a dangerous and destructive journey designed to dilute the power of the federal judiciary to serve as guardian of federal constitutional rights.

Rizzo, in our opinion, improperly limited the discretionary authority federal judges must have to fashion appropriate equitable relief after a constitutional violation has been demonstrated, and sacrificed the power of the federal courts to enforce civil rights and civil liberties on the altar of federalism. "Where, as here," the Supreme Court said, "the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the special delicacy of the adjustment to be preserved between federal equitable power and the state administration of its own law." As articulated, the court's concerns with federalism seem to be expressed for the purpose of avoiding the merits of the case, and leaving citizens to the mercy of the Philadelphia police and Philadelphia courts—neither of which, as the record in *Rizzo* v. *Goode* abundantly demonstrates, shows any interest in the Bill of Right's.

The most conspicuous feature of Justice Rehnquist's opinion in *Rizzo* is its attempted distinction of *Hague*. In *Hague*, the opinion says, police misconduct was grounded on "the adoption and enforcement of deliberate policies by the defendants there (including the Mayor and the Chief of Police) of excluding and removing the plaintiff's labor organizers and forbidding peaceful communication of their views to the citizens of New Jersey." The opinion would have us believe that this is a satisfactory intellectual basis upon which to rest a substantial distinction, but it is not, for the failure of the Philadelphia Police Chief and Mayor to act in face of the notorious misconduct of their police force, results in the same denial of federally protected rights as were present in *Hague*.

It is precisely the Supreme Court's adjustments to the principles of federalism, as reflected in *Hicks* and *Rizzo*,[2] to which we object. There are now a majority of Justices on the Court who are so committed to the "special delicacy" of state-federal relations, that they have lost sight of the fact that one great adjustment of the federal system was the adoption of the 13th, 14th, and 15th amendments. Federal legislation adopted pursuant to those Amendments empowered the federal government to protect the civil rights and liberties of the people, and the judicial branch shares that power and attendant responsibility with the other two branches. But this Supreme Court during the past few years has chosen to follow a different path. It has abandoned its responsibility and left the state courts as the principal resort for protection of civil rights and liberties, even though history has demonstrated that federal forums are essential.

In other recent cases as well, the Supreme Court has made the federal courts less accessible to the ordinary citizen. In *Snyder* v. *Harris* and *Eisen* v. *Carlisle*, the Court construed the rules regulating class actions grudgingly and set up major barriers to effective relief for small claimants. In *Alyeska Pipeline* v. *Wilderness Society*, the Court's decision denied access to the courts to many citizens who lack the resources to retain counsel to represent their interests.

We believe that the courts have a vital role in protecting the rights of citizens. Legal doctrine should be developing in the direction of increasing citizen access to the courts rather than limiting it. Reform of the judicial process should attempt to diminish the handicap which poor litigants suffer in their efforts to invoke the legal process to protect their rights. Liberalization of class action rules and awards of attorneys fees to successful public interest litigants are important to these objectives.

It is time for the Supreme Court to halt its retreat and to stand fast as a defender of rights, as it did from 1954 to 1970. Effective judicial remedies must be available to protect against deprivations of constitutional and statutory rights if our courts are to be the "swift and certain agents of justice" envisioned by Roscoe Pound in the address you are gathered to commemorate.

Remarks of Charles R. Halpern, Executive Director, Council for Public Interest Law

In Dean Pound's speech enumerating the Causes of Popular Dissatisfaction with the Administration of Justice, he observed that the "main reliance of our common law system has been individual initiative." By way of examples, he noted that suits brought by taxpayers were the "chief security for the efficiency and honesty of public officers . . ." and that private suits were relied on to keep

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[2] *Warth* v. *Seldin* and *Paul* v. *Davis* are additional examples.

"public service companies to their duty in treating all alike at reasonable price. . . ." In summary, he stated that "the individual is supposed at common law to be able to look out for himself and to need no administrative protection." Dean Pound concluded, however, that the "whole scheme of individual initiative is breaking down" and being replaced by a "collectivist" desire to develop governmental administrative mechanisms to safeguard the public interest.

In the decades since Dean Pound spoke, there have been striking changes in the relative importance of "individual initiative," on the one hand, and administrative regulation, on the other, as devices to secure the public good. The rise of administrative regulation, accelerated in the 1930's, was undoubtedly a reflection of the "collectivist" sentiment which Dean Pound noted in 1906—an effort to develop new governmental institutions to replace "individual initiative" as a system for controlling the behavior of great institutions.

I suggest that this reliance on administrative regulation is now waning and that we have entered a new stage—a stage in which "individual initiative", exercised through the legal process, has a crucial importance that has not been adequately recognized within the legal system. In drawing a road map for legal reform, "individual initiative" must be given broader scope. Few people still share the "collectivist" enthusiasm for exclusive reliance on administrative regulation. We must think in new ways about a hybrid system, involving both governmental action and citizen initiative.

Without doubt, the landmark judicial recognition of the new role of "individual initiative" was the decision by the Chief Justice, then a Judge on the Court of Appeals for the District of Columbia Circuit, in the celebrated *Church of Christ.* case.[1] That case involved an effort by black citizens in Mississippi to demand an end to racist broadcasting by a federally-licensed television station. The Federal Communications Commission took the position that the issue fell within its regulatory responsibility and that there was no need for citizen involvement. In rejecting the FCC's view, Judge Burger recognized the crucial role of individual initiative. Stating that "consumers are generally among the best vindicators of the public interest," he held that the agency could not properly exclude representatives of legitimate listener interests from its proceedings.

The intervening years have seen a growing number of citizen groups taking initiative to demand compliance with law from large institutions—both governmental and private. The reasons why citizen initiative at this time has come to be so significant are complex. At bottom, there is an indisputable lack of confidence in the performance of large institutions, including administrative agencies. Recent revelations of crimes in high places, in the Justice Department as well as corporate board rooms, have, undoubtedly, fueled these doubts. Even prior to these disclosures, though, there was a growing sense that the great institutions of society were out of control. This has led to citizen efforts to reassert influence over these institutions. Citizens have taken action to participate in the decision-making processes that affect their lives. They have pressed governmental agencies to act in the public interest and enforce the law; where necessary, they have sought judicial remedies for institutional lawlessness.

An example will illustrate the point. In the 1960's, scientific information indicated that DDT, a pesticide that persists in the environment for a long period after its application, was being over-used in American agriculture. The Department of Agriculture, which had regulatory responsibility, was licensing this pesticide for various uses without taking into account the data indicating damage to the environment and hazards to human health—despite statutory requirements that it do so. The concerned citizens who tried to move the Department of Agriculture to act were unsuccessful.[2] It was only after they turned to the courts and obtained an order requiring the agency to act in compliance with the law that the administrative proceedings which led to the banning of DDT for most purposes began. We need not consider here whether the Department's inaction was due to bureaucratic inertia, excessive influence by the industry which was supposed to be regulated, a lack of adequate concern for environmental considerations, or other factors. The fact remains that individual initiative, through the court system, was the key to obtaining effective action and compliance with the congressional mandate.

The challenge to the legal system in this collectivist age is to facilitate and encourage individual initiative through the courts to assure that constitutional and statutory rights are respected, that government agencies do their job, and that corporations

[1] *Office of Communication of United Church of Christ* v. *FCC,* 359 F.2d 994 (D.C. Cir. 1966).

[2] See *Environmental Defense Fund* v. *Hardin,* 428 F.2d 1093 (D.C. Cir. 1970).

function within the law. But at the present time citizen access to the legal system is too often blocked by the high cost of legal representation, by restrictive legal doctrines and by the disadvantages, inherent in the legal process, faced by ordinary citizens when they litigate against large, financially strong adversaries. Legal institutions and legal doctrines must be modified in order to address these problems. At a time of great public disillusionment with the performance of public and private institutions, the availability of the courts as a channel for redress is critically important.

I recognize that this places me at odds with a significant number of prior speakers, who have been exploring ways to reduce the caseload of judges, to find alternatives to the courts, and to reverse the "explosive" growth of class actions. However, as I understand our charge today, we are to discuss ways in which the interests of iustice can be better served. In my view the interests of justice can be best served by assuring that the courts are open to citizens exercising "individual initiative" to demand compliance with the law, and that the courts provide a setting in which the financial strength of litigants is not dispositive.

Obviously, there are certain matters which can and should be resolved in a forum that is cheaper, quicker, and more informal than the courts. But the identification of such matters should not blind us to the importance of opening the courts to a range of important cases which are too frequently kept out of the courts by restrictive legal doctrines and the high costs of litigation.

As you all know, several recent Supreme Court decisions have gone in the direction of limiting citizen access to the courts and making citizen suits even more financially difficult. For example, recent decisions on standing have sharply restricted access to the courts. Barriers to citizen action have been further raised in the Court's interpretation of Rule 23 on class actions. The Court's class action decisions have severely diminished the utility of that mechanism, which was designed to make redress of small individual grievances economically feasible. And, in holding in the *Alyeska Pipeline* case that federal courts lack the power to award attorneys' fees to citizens suing as "private attorneys general," the Court has created a financial roadblock for citizen action.

I submit that the trend reflected in these decisions—a trend toward making legal recourse less accessible to ordinary citizens—is likely to increase popular dissatisfaction with the administration of justice.

I think it is essential to reverse that trend.

I urge consideration of the following concrete suggestions to make the courts a more potent instrument for justice and a more hospitable forum for individual initiatives in the public interest:

REALLOCATING THE COSTS OF LITIGATION

The largest barrier to citizens who want to use the courts to vindicate rights and enforce legal and constitutional duties is the high cost of litigation, particularly the high cost of attorneys' fees. There are few citizens or groups who can afford the enormous costs of carrying major litigation. In the past few years there have been significant programs established to help deal with this problem. The Legal Services Corporation, which underwrites legal services for the poor, is one example. Foundation-funded public interest law firms, which have protected the rights of environmentalists, consumers, racial minorities, and others, are another. In assessing the impact of there new participants in the adversary process, Judge Harold Leventhal of the Court of Appeals for the D.C. Circuit stated recently:

Public interest representatives have identified issues and caused agencies and courts to look squarely at problems that would otherwise have been swept aside and passed unnoticed. They have made complaints, adduced and marshalled evidence, offered different insights and viewpoints, and presented scientific, historical and legal research. They have, in my view, been of significant service to the entire decisional process.[3]

But funding for these public interest law programs has, to date, been grossly inadequate to meet the need, and even this funding is of uncertain duration. The foundations who have most actively supported public interest law have indicated that their support cannot be expected to continue indefinitely. The legal system itself must develop internal mechanisms to underwrite the cost of citizen litigation. An important device toward this end, which has a significant common law history and specific statutory endorsements, is the award of attorneys' fees to private litigants whose lawsuits confer substantial public benefits. The

[3] Statement of Judge Harold Leventhal at Hearings on S. 2715 before the Senate Judiciary Subcommittee on Administrative Practice and Procedure, February 6, 1976.

"private attorney general" is the heir to the individual suing to enforce the law about whom Dean Pound spoke. The courts and the legislatures should be extending the availability of fee awards in cases involving a public benefit—not limiting it—so that we move toward a system in which the costs of litigation are reallocated to enable and encourage citizens to undertake legal action to enforce constitutional and statutory rights. This fee-award concept now has its counterpart at the administrative level, in the Federal Trade Commission's program to reimburse the costs of citizen participation in rulemaking proceedings, an approach that Congress is now considering expanding to other agencies and to adjudicatory proceedings as well.

MAKING IT EASIER TO AGGREGATE SMALL CLAIMS FOR LITIGATION PURPOSES

Rule 23 of the Federal Rules of Civil Procedure represents a pioneering effort to provide a judicial forum for aggrieved citizens whose individual claims against a single defendant are too small to justify the expense of litigation. Suppose, for example, that 10,000 defectively designed refrigerators are manufactured and sold. No individual purchaser has a sufficient economic interest to file suit against the manufacturer. The class action was designed to permit an effective judicial remedy for cases of that nature.

The purpose of the class action was described by Justice Douglas:

"I think in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures who would go begging for justice without the class action but who could with all regard to due process be protected by it. . . ."

The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth.[4]

Recent Supreme Court decisions have made class actions very difficult to bring, and some recommendations offered at this conference would further decrease the utility of the class action. This would undoubtedly be a comforting development for prospective defendants, but it would be a serious blow to citizens and a set-back to those who want the courts to be an open and accessible forum for resolution of grievances.

In a recent speech, Justice Stanley Mosk of the California Supreme Court suggested that citizen groups should "join hands . . . in a mutual effort to save the class action." Further he suggested:

"If the courts are too far committed to the ultimate demise of such proceedings, then appropriate action through Congress and state legislatures may be indicated." This observation is a wholesome reminder that access to the courts is a matter of concern to all the people, and not ultimately a matter to be resolved internally within the legal profession.

REDUCING THE DISPARITY BETWEEN RICH AND POOR LITIGANTS

In making the courts a more just forum for citizen litigation, we must also keep in mind that access to the courts is only the beginning. The courts must also make an active effort to minimize the disparities in litigating capacities between the rich and poor—by accommodating the diverse interests at stake in complex litigation through liberal admission of *amici curiae;* by becoming involved in the discovery process to prevent harrassment of litigants with scarce resources; by appointing expert witnesses to equalize access to technical data; and by experimenting with flexible mechanisms to assure that decrees are effectively implemented.

CONCLUSION

I believe that individual initiative through the courts to assure that corporations, government agencies and other powerful institutions behave in compliance with the law is critical and must be facilitated. This is not to say that every dispute or citizen grievance should be brought to court, or that citizens should look to the judiciary for relief of all their problems, including those that are more properly placed before the political branches of the government.

But constitutional rights cannot be left to the vagaries of the political process; and legislative mandates cannot be left to administrative agencies to bend as

[4] *Eisen* v. *Carlisle and Jacquelin,* (1974) 417 U.S. 156 185–86 (Douglas, J., dissenting) [footnote omitted].

they see fit, free of the check of judicial review. There is an indispensable judicial role in both classes of cases. Recent progress of many citizens—racial minorities, the mentally impaired, voters aggrieved by legislative malapportionment, environmental protection groups, consumers—would not have been possible but for the availability of judicial remedies. These remedies should be expanded and citizen access improved.

AMERICAN JUDICATURE SOCIETY,
Chicago, Ill., June 15, 1976.

Hon. JOHN V. TUNNEY,
Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, Washington, D.C.

MY DEAR SENATOR TUNNEY: In response to your request that the Society might wish to file a statement with the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, on behalf of the Society I have the privilege of transmitting to you the attached.

Sincerely yours,

ARLIN M. ADAMS.

STATEMENT OF THE AMERICAN JUDICATURE SOCIETY PREPARED FOR SUBMISSION TO THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE JUDICARY COMMITTEE OF THE U.S. SENATE

The American Judicature Society wishes to take this opportunity to endorse the work of the Subcommittee on Constitutional Rights as it seeks to precipitate concern and action regarding causes of popular dissatisfaction with the administration of justice. As the Subcommittee may know, the Society has been associated, since its founding in 1913, with this goal. Dean Roscoe Pound's historic 1906 address established the theme for these hearings, it effectively launched a court reform effort which encompassed the founding of the American Judicature Society and continues to the present date. Consequently, the Society has a unique awareness of the weaknesses and strengths of our judicial systems, shaped by its many years of addressing the issues raised by this Subcommittee.

Rather than attempting to attribute the causes of failure, perhaps the Society can best serve the Subcommittee by suggesting some potential solutions and remedies that it has espoused over the years for what ails our many judicial systems, for there are a multitude of independent, interlocked and overlapping court systems in our society.

What, then, are some of the broad approaches to improving the judicial system for all of our citizens—those who find themselves enmeshed in the system as well as those charged with the responsibility for administering justice?

JUDICIAL SELECTION AND TENURE

The popular election of judges, arising out of the "Jacksonian democracy" period of our history, brought about substantial criticism at the close of the last century regarding the quality of the judiciary. A search for something better, led by the Society, resulted in a non-political plan generally known as the Merit or Missouri Plan. It provides for the selection of judges by an appointing official (usually the governor of the state) from a panel of names submitted by a nominating committee. Such committee is generally nonpartisan or bipartisan in nature, and includes judges, lawyers and nonlawyers in its membership. Endorsed by the American Bar Association in 1937, the Merit Plan today is being used with respect to all or a portion of the judiciary in more than half of the states. Most other states have it under consideration, and it appears destined ultimately to replace the election of judges as a predominant method of judicial selection in this country. In furtherance of this objective the Board of Directors of the American Judicature Society has appointed a special committee to study feasibility of a federal judicial nominating committee to make recommendations with regard to federal judicial selections. Once accomplished, these plans will assure better prospects for an impartial and independent judiciary.

JUDICIAL DISCIPLINE AND REMOVAL

By far the most extensive adoption of a single plan for court improvement has been the replacement of the impeachment process for ridding our courts of overage, disabled, or ineffective judges with specific commissions or bodies charged with the responsibility for investigating charges against judges and to make recommendations to state supreme courts which have the power to administer discipline. By 1976 forty-four states, including Puerto Rico and the

District of Columbia, had adopted some judicial disciplinary machinery other than impeachment. Judges who are guilty of misconduct, are grossly incompetent or suffer from some disabling disease or disorder, have no place in judicial administration. The extension of such plans to all fifty states and the federal courts and their improvement is another basic ingredient of a good judicial system.

ORGANIZATION OF COURTS

The proliferation of courts in this country tending to follow the English pattern has been a major contribution to some of the current problems. Successful efforts to unify courts into a cohesive, simple-tiered system has done much to strengthen and streamline the judicial process, providing it with flexibility and concentration of judicial power and responsibility. At this time only sixteen states have implemented Roscoe Pound's ideal of a single-structured court divided into two or three levels, one to handle the appellate business and one or two for trial work. The manner in which courts are financed is an important aspect of a successful court unification plan. A central tenet of state court reform is full state funding of state court systems—unitary budgeting. Although not a panacea to judicial administrative ills, a system of unitary budgeting which allows for administrative autonomy for self-sufficient local units could lead to improving the fiscal, managerial and constitutional position of the judiciary and thus give us better courts.

COURT ADMINISTRATION

Essential to the smooth function of the courts and replacement of the "go-as-you-please" system characterized by Chief Justice William Howard Taft is the establishment of professional administrative talent in the court system. Individual judges should be relieved from problems of non-judicial personnel, budget and calendar, so as to devote their principal attention to serving in a truly judicial capacity. The employment of professional administrators has become the practice of the majority of the states and within them, most of the major city courts. Further development and expansion of this critical back-up service to the courts will furnish a partial solution to the backlog crisis facing many of our judicial systems.

Court reforms such as those briefly outlined above, as well as other programs which the Society supports, including adequate judicial salaries, retirement benefits and tenure; mandatory judicial retirement plans which permit utilization of retired judges in court systems; improvements in the entire criminal justice system; and continued education programs for judges and court personnel are all aimed at helping the judicial system function more efficiently. Combined with other companion projects, such as making legal representation available to all citizens, the courts will become accessible to all and provide an effective forum for dispute settlement, whether civil or criminal.

The American Judicature Society is committed to these goals and thanks you for this opportunity to participate in the important undertaking of this Subcommittee.

FEDERAL TRADE COMMISSION,
New York Regional Office, May 28, 1976.

Hon. JOHN V. TUNNEY,
Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, Senate Office Building, Washington, D.C.

DEAR SENATOR TUNNEY: In reply to your inquiry of May 20, 1976, the New York Regional Office receives approximately 50,000 consumer complaints per year, of which I estimate approximately 15,000 involve instances where the complainant and the firm involved are in different states. Approximately 2,000 of these remain unresolved. In cases involving firms in the same locality as the complainant, we routinely recommend resort to small claims court where appropriate to obtain an adjudication on the merits.

Where the consumer and the firm are located in different states, however, this is not practicable. No mechanism now exists for adjudication of the merits in this kind of situation involving individual complaints. Where a violation of federal law of sufficient magnitude is involved, consumer redress under section 206 of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act may, of course be sought.

The above response is designed to be solely an informational response to your request and not to convey any conclusions or recommendations on behalf of either the Federal Trade Commission or its staff with respect to the matter.

Respectfully,

RICHARD A. GIVENS, *Regional Director.*

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